IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6158

DONALD LINDSEY, ET AL.,

Appellants,

vs.

DOROTHEA M. NORMET, ET AL.,

Appellees.

APPEAL FROM THE U. S. DISTRICT COURT
FOR THE DISTRICT OF OREGON

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS	
1970			
Jan.	7	Filed Complaint	
	7	Filed pltf's motion for rule to show cause	
	7	Filed and Entered Order to show cause; January 12, 1970, at 10:00 a.m.	B
	7	Filed Notice	
	12	Filed pltf's motion to proceed in forma pauperis	
	12	Record of hearing on Order to show cause	
	12	Record of motion for temp restraining order against Judge Wm. C. Beers, Judge, Mult Co., Dist Court, taking action to evict Randall Lowe, pltf	
	12	ENTERED ORDER denying motion	G
	12	Record of motion that matter be presented to a three judge Court	
	12	Entered Order referring matter to a three Judge Court and certification to Chief Judge Ninth Circuit	G
	12	Record of motion to proceed in forma pauperis	
	12	Entered Order that motion be held in abeyance	G
	12	Record of motion for temp restraining order for any action arising out of this case in Mult Co	
	12	Entered Order staying execution on judgment for five days or until the three judge Court is constituted, and if not constituted within five days, pltf may petition for renewal of restraining order	G
	12	Entered Order that counsel to put a proper heading and identifying cover on the answer tendered in action in Dist Court Mult Co.	G

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
1970		
Jan.	12	Filed pltf's motion for joinder of Honorable William C. Beers, and all persons holding office as Judged of the Dist and Circuit Court of the State of Oregon, as a class
	12	Filed and Entered Order that Beers and all persons similarly situated are joined; pltfs are granted ten days from date hereof to file an amended complaint G
	12	Filed pltf Randall Lowe's motion for temporary restraining order against defts, Beers, and all persons in class
	12	Filed and Entered Order for temp restraining order against Orville G. and Vivian L. Grubb, Honorable Beers, from ordering execution of eviction for a period of five days from date hereof; that this order applies specifically to action at Number 76728 in Dist Court for the State of Oregon, for County of Mult, etc. G
	12	Filed and Entered Order that temp restraining order granted against William E., John, and Eugene C. Skourtes, also Dorthea N. Normet— pltf Evaret Snyder granted rest order against Frank H. and Eleanor M. Kelley; pltf Keith Oetting is granted rest order against Edith Manning; pltf Randall Lowe is granted rest order against Orville G. and Vivian L. Grubb; pltfs Princess Thomas and Marie Dunne granted rest order against George C. Staples and Bud Specca (See Order) G
	13	Filed and Entered Order that temp rest order issued on Jan. 12, 1970, is continued in full force and effect until hearing; hearing is to be held on Tuesday, Jan 20, 1970, at 2:00 p.m. in this Court G

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS	
1970		
Jan. 14	Filed and Entered Notification and Certificate of Three Judge Court	G
19	Filed Order designating US. Circuit Judge and United States Dist Judged pursuant to § 2284, Title 28, USC (m1/19/70)	Chambers
20	Filed pltfs' motion for determination of class action pursuant to Federal Rule of Civil Procedure Number 23 (c) (1)	
21	Filed Amended Complaint	
21	Filed Notice to plead	
21	Filed and Entered Order re temp rest order	G
21	Filed and Entered Order granting leave to maintain class action, etc.	G
21	Filed and Entered Order granting pltfs leave to proceed informa pauperis	G
20	Record of hearing on motion for temp rest order	
20	Record of pltf's motion to proceed in forma pauperis	
20	Entered reder allowing motion to proceed without paying costs or security	G
20	Record of oral motion by Mr. Clough that all judges of the Dist Court be enjoined from entering judgment against all named pltfs in this action	
20	Entered Order restraining dist Judges from entering judgment or ordering execution on any action brought by the other names defts against the above named pltfs. Pltfs Lindsey, Snyder and Lowes to pay back rent or give security or further rent to Legal Aid who will hold the money in a special Trust Account until deposited funds are paid as ordered by the Court (blotter m 1/22/70) q	G

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1970	
Jan. 26	Filed interr to defts (delivered copy to Kilkenny, Belloni and Goodwin)
29	Filed pltfs' request for admissions with three copies; original to calendar clerk copies to Judges Kilkenny, Solomon & Goodwin
30	Filed Stipulation re facts admitted into evidence (see Stipulation) copies delivered
30	Filed motion for joinder of persons needed for just adjudication; join Dorothy Drauser (with three copies)—copies distributed
30	Filed Stipulation of Factsre dismissal as to Orvcille G and Vivian L. Grubb copies delivered
Feb. 2	Filed and Entered Order that defts Orville G. and Vivial L. Grubb be dismissed copies delivered G
2	Filed and Entered Order that complaint be amended to include Dorothy Drauser, egc. copies delivered G
2	Filed Notice of Depos; Depos of Josephine Brown will be taken on Friday, 13, Feb. 1970 at 11:14 a.m. at Legal Aid (copies delivered to K, S, G)
10	Filed and Entered Order that Bonnie L. Colton is granted leave to intervene as a party pltf and that Richard McGowan, et us, Gene W. Rossman, Fred M. Rosenbaum and William Martin are joined as defts pursuant to motion of Bonnie Colton; temp rest order is granted to Bonniel L. Colton against the Honorable William C. Beers, etc. (cert copies delivered to K, S, G) on 2/12/70) G
10	Filed Motion to intervene as a party pltf and motion for substitution of John Does or joinder of persons needed for just adjudication (cert copies delivered to K, S, G 2/12/70)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS	
1970			
Feb.	11	Filed Dorthea M. Normet's motion for extension of time within which to plead to pltfs' amended complaint and answer of request for admissions (copies 2/26/70)	
	13	Filed Answer to motion for extension of time with three copies (copies delivered this date)	
	10	Filed pltfs' motion for transcript (copies delivered 2/16/70)	
	10	Lodged memorandum of law in support of above motion 2/16/70	
	12	Filed motion for leave to proceed in forma pauperis-Colton (2/16/70)	
	12	Filed Colton's demand for jury trial (copies 2/16/70)	
	16	Filed and Entered Order that Bonnie Colton may proceed in forma pauperis (copies 2/16/70)	G
	16	Filed and Entered Order that transcripts be made (copies delivered 2/16/70)	G
	20	Filed Answer to pltfs' request for admission of deft Dorothea M. Normet (copies 2/26/70)	
	24	Record of hearing on deft's motion for extension of time to answer requests for admissions	
	24	Filed pltf motion to strike deft Normet's answers' to pltfs' request for admissions	
	24	Entered Order that defts file answer to complaint by March 2, 1970	G
	24	Entered Order denying pltf's motion to strike	G
	24	Entered Order allowing defts motion for extension of time to answer requests for admission	G
	24	Entered Order that all testimony will be documentary, etc.	G

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1970	
Feb. 24	Record of pltf's motion for transcript of proceedings
24	Entered Order allowing motion for transcript (copies 2/26/70—Blotter) G
24	Filed authorization for transcript of proceedings at government expense. G
March 2	Filed Motion of deft Dorothea M. Normet for more definite statement (copies delivered 3/5/70)
9	Filed and Entered Order that defts' motion to extendin time to answer is overruled, and deft allowed until 5:00 p.m. Friday, March 13 to answer, etc. (copies delivered 3/11/70) G
9	filed answer of Dorothy M. Brauser (copies 3/11/70)
9	Filed and Entered Order (on stip) that Housing Authority be added and substituted for Rose and Martin (copies delivered 8/11/70)
9	Filed Stipulation that defts Housing Authority and Gene W. Rossman have to and including April 9 to answer GRANTED (copies delivered 3/11/70)
11	Filed Motion to strike answer of dorothy m. brauser (copies 3/12/70)
11	Filed Motion for joinder of persons needed for just adjudiciation copies (3/12/70)
11	Filed and Entered Order that Timmons, Steinbachs & Hartman be joined as defts (3/12/70) G
11	Entered Order setting for ptc Monday April 20 at 10:00 a.m. (3/10/70) G
13	Filed Answer of deft Dorothea M. Normet to pltfs' amended complaint (copies 3/16/70)
17	Filed motion to dismiss

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1970	
March 19	Filed defts Housing Authority of Portland and Gen Rossman's motion to revoke temp rest order
23	Filed/Stipulation that argument on defts' motion to dismiss be continued generally until' either counsel requests the Clerk to set same G
23	Entered Order setting hearing on motion for revocation of temp rest order in Bonnie Colton case for Monday, April 13, 1970, at 9:30 a.m. G
24	Filed answer in opposition to defts' motion to revoke temp rest order (copies delivered t . . .
25	Filed Notice of depos of Gene Rossman (copies delivered this date)
26	Filed Notice of depos of Bonnie L. Colton (copies delivered)
April 7	Filed Order of dismissal that pltfs Princess Thomas and Marie Dunne have removed from the premises they occupies with Brauser, and this matter is now moot, and cause is dismissed with prejudice against Bruaswer; attys for pltf Thomas and Dunne turn over forthwith to deft Brauswer of her atty such monies which pltfs attys deliver) hold on deposit on their behalf Om4/7/70) G
7	Filed Affidavit of Martin
7	Filed Answer of housing authority of portland, oregon, and gene w. rossman COPIES D.
8	Filed Certification of service of Pto COPIES D.
10	Filed Notice of deposition (copies delivered)
13	Record of hearing on motion for pevocation of Temp Rest Order
13	Entered Order continuing case until matter determined by State Court Proceedings G

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1970	
April 17	Filed Deposition of Mrs. F. Clair (Josephine) Brown.
20	Filed and Entered Order revoking Restraining Order pertaining to Bonnie L. Colton (M4/21/70) G
28	Filed Reporter's transcript of Proceedings dated April 13, 1970
11	RE Entered Order resetting Trial June 18, 1970, at 9:30 a.m. S
13	Filed Pltf's Brief with three copies (delivered copies this date)
June 1	Filed Brief of Deft Dorothea M. Normet with three copies (delivered this date)
5	Lodged Pltfs' Reply Brief (delivered copies this date)
8	Filed Deft's Supplemental Memorandum of Law by The Honorable William C. Beers, etc. with Order by Judge Goodwin attached permitting filing (copies delivered 6/17/70) Rec'vd at docket desk 6-17-70
17	Lodged Pretrial Order (copies delivered per C. Mundorff; also to make changes)
18	Record of Three-Judge Court Trial
18	Filed and Entered Pretrial Order B
18	Entered Order taking UNDER ADVISEMENT K, S, G
July 1	Filed Joint Motion for Settlement and Dismissal of defts Donald Dale Timmons, Howard D. Steinbach and his wife, Marion Steinbach, and Stanley E. Hartman, individually and in Their capacities as officers and/or agents of the Belmont East Corp. (copies delivered 7/1/70)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
1970		
July	1	Filed and Entered Order that defts Donald Dale Timmons, Howard D. Steinbach and his wife Marion Steinbach, and Stanley E. Hartman, individually, and in their capacities as officers and or agents of the Belmont East Corporat, are dismissed (copies delivered 7/1/70) G
Sept	10	Filed and Entered Opinion that defts have judgment for their costs and disbursements; Temporary Restraining Order is vacated and the escrow is ordered to distribute all rentals to the appropriate persons and close the escrow (M9/9/70) K
	10	Filed and Entered Judgment DISMISSING (m9/9/70) K, S, G
	14	Filed and entered order permitting appeal in forma pauperis. G
	14	Filed notice of appeal by plaintiffs. Counsel notified.
	15	Filed Cost Bill
	18	Filed Objections to Bill of Costs and Motion to Strike Bill of Costs (with three copies)
Oct	7	Filed and entered order to proceed in forma pauperis and transcript at government expense G
	7	Filed designation of record on appeal
	12	Filed AO Form 207 authorization for transcript at government expense G
Nov	10	Mailed Certified clerk's record (original pleadings &; all exhibits) to Supreme Court of the United States. Counsel notified.
Dec	14	Filed reporter's transcript of proceedings of June 18, 1970

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, MARIE DUNNE, and all other persons similarly situated, PLAINTIFFS

vs.

WILLIAM E. SKOURTES, JOHN SKOURTES, EUGENE C. SKOURTES, DORTHEA M. NORMET; FRANK H. KELLEY, ELEANOR M. KELLEY; EDITH MANNING, individually and in her capacity as Secretary-Treasurer of ALUMINUM WINDOW PRODUCTS COMPANY, an Oregon corporation; ORVILLE G. GRUBB, VIVIAN L. GRUBB; GEORGE C. STAPLES, individually and in his capacity as owner

and Secretary of AAA HEATING AND COOLING, INC., an Oregon corporation; BUD SPEZZA, individually and in his capacity as President of AAA HEATING AND COOLING, INC., an Oregon corporation; THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; ALL PERSONS SIMILARLY SITUATED, HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH; and JOHN DOES I through XXX, DEFENDANTS

PLAINTIFFS' AMENDED COMPLAINT—
Filed January 21, 1970

COMPLAINT

I.

1. This is a civil action on behalf of the individual Plaintiffs and all other persons similarly situated for a declaratory judgment of the unconstitutionality of Oregon Revised Statute Sections 105.105, et seq., which provides for actions of Forcible Entry and Wrongful Detainer, which procedure is in violation of Plaintiffs' constitutional rights, and for a temporary restraining order, a preliminary and permanent injunction against the continued use of the objectionable statutory provisions.

2. The jurisdiction of this Court is involved pursuant to 28 USCA Sections 1343, 2201, and 2202; and 42 USCA Section 1983.

3. Application is hereby made for the convening of a three-judge Federal District Court to hear and determine this matter pursuant to 28 USCA Sections 2281 and 2284.

II.

4. The Plaintiffs are:

(a) DONALD LINDSEY and EDNA LINDSEY, husband and wife, individuals who are citizens of the

United States and of the State of Oregon, with their residence at 3732 S. E. Grant Court, City of Portland, County of Multnomah, State of Oregon;

(b) EVARET SNYDER, an individual who is a citizen of the United States and of the State of Oregon, with his residence at Apartment 3, 1224 S. E. Belmont, City of Portland, County of Multnomah, State of Oregon;

(c) KEITH L. OETTING, an individual who is a citizen of the United States and of the State of Oregon, with his residence at 849 S. E. 151st Avenue, County of Multnomah, State of Oregon;

(d) RANDALL LOWE and MARJORIE LOWE, husband and wife, who are citizens of the United States and of the State of Oregon, with their residence at 3822 N. E. 66th Avenue, City of Portland, County of Multnomah, State of Oregon;

(e) PRINCESS THOMAS and MARIE DUNNE, individuals who are citizens of the United States and of the State of Oregon, with their residence at Apartment 6, 2412 N. E. Union Avenue, City of Portland, County of Multnomah, State of Oregon;

(f) All other persons, resident in the State of Oregon, whose rights are, have been, or will be affected by the operation of Oregon Revised Statute Sections 105.105, et seq.

5. This is a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is all those residents of Oregon who are, or have been, or will be, affected by the operation of Oregon Revised Statute Sections 105.105, et seq.

6. The class is so numerous that joinder of all members in this action is impracticable.

7. There are questions of law or fact common to the class.

8. The claims of DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, and MARIE DUNNE, are typical of the claims of the class.

9. DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, and MARIE DUNNE, and their attorneys, will fairly and adequately protect the interests of the class.

10. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for Defendants in this case.

11. The prosecution of separate actions by individual members of the class would further create a risk of adjudications with respect to individual members of this class which would as a practical matter be dispositive of the interest of other members of the class not parties to the adjudication.

12. The Defendants in this case have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

13. Questions of law or fact common to the members of the class as a whole predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and effecient adjudication of this controversy.

III.

14. The Defendants, WILLIAM E. SKOURTES, JOHN SKOURTES, EUGENE C. SKOURTES and DORTHEA M. NORMET, are the equitable and legal title holders of the property located at 3732 S. E. Grant Court, City of Portland, County of Multnomah, State of Oregon, and as such, they, or any one of them, are or are in the position of being, the landlords of the Plaintiff-Tenants, DONALD LINDSEY and EDNA LINDSEY, and they or their agents, servants or employees have threatened to institute an action of Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute Sections 105.105, et seq., to evict said Plaintiff-Tenants.

15. The Defendants, FRANK H. KELLEY and ELEANOR M. KELLEY, are the owners of the property located at 1224 S. E. Belmont, City of Portland, County of Multnomah, State of Oregon, and as such they are, or are in the position of being, the landlords of the Plaintiff-Tenant, EVARET SNYDER, and they or their agents, servants or employees, have threatened to institute an action of Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute, Sections 105.105, et seq., to evict said Plaintiff-Tenant.

16. The Defendant, EDITH MANNING, in her capacity as Secretary-Treasurer of the ALUMINUM WINDOW PRODUCTS COMPANY, an Oregon corporation, with its principal place of business in the City of Portland, County of Multnomah, State of Oregon, has executed a complaint initiating an action of Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute, Sections 105.105, et seq., against Plaintiff, KEITH L. OETTING, in the District Court of the State of Oregon for the County of Multnomah, at No. 75743.

17. The Defendants, ORVILLE G. GRUBB and VIVIAN L. GRUBB, are the owners of the property located at 3822 N. E. 66th Avenue, City of Portland, County of Multnomah, State of Oregon, and as such are in the position of being the landlords of the Plaintiff-Tenant, RANDALL LOWE, and they or their agents, servants, or employees, have instituted an action of Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute, Sections 105.105, et seq., to evict said Plaintiff-Tenant at No. 76728 in the District Court of the State of Oregon for the County of Multnomah.

18. The Defendants, GEORGE C. STAPLES, individually, and in his capacity as owner and Secretary of AAA HEATING AND COOLING INC., an Oregon corporation, and BUD SPEZZA, individually, and in his capacity as President of AAA HEATING AND COOLING, INC., an Oregon corporation, through the corporation of which they are officers and in which they have an interest, have control of property owned by AAA HEATING AND COOLING, INC., an Oregon corporation, and located at 2412 N. E. Union Avenue, City of

Portland, County of Multnomah, State of Oregon, and as such are, or are in the position of being, the landlord, individually or through their agent, servant, manager, or employee, of the Plaintiff-Tenants PRINCESS THOMAS and MARIE DUNNE, and they, through their agents, servant, manager or employees, have threatened to institute an action of Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute, Sections 105.105, et seq., to evict said Plaintiff-Tenants.

19. The Defendants, WILLIAM E. SKOURTES, JOHN SKOURTES, EUGENE C. SKOURTES, FRANK H. KELLEY, ELEANOR M. KELLEY, ORVILLE G. GRUBB, VIVIAN L. GRUBB, and GEORGE C. STAPLES, are the owners of other property held for rental income purposes and whose tenants may be subject to actions of Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute, Sections 105.105, et seq., and who are, have been, or may be, members of the class of Plaintiffs as defined by Paragraph 4. (g) of this Complaint.

20. Defendant, WILLIAM C. BEERS, is a duly elected State official whose duty and function is to uphold and construe the laws of the State of Oregon, in particular Oregon Revised Statute, Sections 105.105, et seq., and further to hear and decide cases and issues raised by party litigants in lawsuits brought pursuant to said Statute.

Defendant, WILLIAM C. BEERS, in his capacity as District Court Judge of the State of Oregon for the County of Multnomah, has before him for consideration the case captioned ORVILLE G. GRUBB and VIVIAN GRUBB, husband and wife, Plaintiffs, vs. RANDALL LOWE and JANE DOE LOWE, husband and wife, Defandants, at No. 76728 of said Court; which case is one brought pursuant to Oregon Revised Statute, Sections 105.105, et seq.

At the hearing held on Monday, January 12, 1970, at 2:30 PM before said Defendant, WILLIAM C. BEERS, said Judge struck all of the affirmative defenses raised by RANDALL LOWE and MARJORIE LOWE and entered judgment for the Plaintiffs.

21. Said named Defendant, WILLIAM C. BEERS, is representative of all Judges of the District Court of the State of Oregon for the County of Multnomah joined hereby as a class of Defendants.

(a) Said class of Defendants are persons whose identity may be readily ascertained although to specifically name and join each one would render pleadings and management of the lawsuit unweildy, burdensome and impracticable.

(b) There are questions of law or fact common to the class, and the claim of Plaintiff, RANDALL LOWE, against the class of Defendants is typical of the claims of the class of Plaintiffs against the class of Defendants.

(c) The defenses of the representative party are typical of the defenses of the class, and the representative party would fairly and adequately protect the interests of the class.

(d) The class action is superior to other available methods for the fair and efficient adjudication of this controversy.

(e) Said class of Defendants are the sole persons who hear and determine lawsuits brought pursuant to Oregon Revised Statute, Sections 105.105, et seq.

22. The Defendants, John Does I through X, inclusive, represent and are any other persons who are officers, agents, servants, employees, managers, or assignees, of any of the named Defendants as defined in Paragraphs 14 through 20, inclusive, of this Complaint, who have the ability to pursue any action against any of the named Plaintiffs, for Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute, Sections 105.105, et seq.

23. The Defendants, John Does XI through XX, inclusive, represent and are any persons who are officers, agents, servants, managers, or employees, of any groups, organizations, associations, or societies, whose members include persons named, or to be named, as Defendants in this action and whose membership qualifications include, in part, the ownership or management of real

property used for the purpose of leasing or renting such real property to individual tenants who are, have been, or will be members of the class of persons as defined in Paragraph 4 (g) of this Complaint.

24. The Defendants, John Does XXI through XXX, inclusive, represent and are any persons acting on their own behalf or acting as officers, agents, servants, or employees of any individual, partnership, business, corporation, or other business entity who are, or will be, utilizing the provisions of Oregon Revised Statute, Sections 105.105, et seq., against any individual tenants who are, have been, or will be members of the class of persons as defined in Paragraph 4 (g) of this Complaint.

25. As soon as practicable after the specific identity of any of the Defendants John Does I through XXX are ascertained, they will be properly identified by motion and process served and, where necessary, the appropriate party Plaintiff will be interpleaded as a Plaintiff in this action.

IV.

26. Oregon Revised Statute, Sections 105.105, et seq., reads as follows:

> 105.105 Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force.
>
> 105.110 Action for forcible entry or wrongful detainer. When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.
>
> 105.115 Causes of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement under which he holds, or to deliver possession of the premises after being in default on payment of rent for 10 days.

(2) When the lease by its terms has expired and has not been renewed, or when the tenant or person in possession is holding from month to month, or years to year, and remains in possession after notice to quit as provided in ORS 105.120, or is holding contrary to any condition or covenant of the lease or is holding possession without any written lease or agreement.

105.120 Notice is necessary to maintain action in certain cases; waiver of notice; effect of advance payments of rent. (1) An action for the recovery of the possession of the premises may be maintained in cases provided in subsection (2) of ORS 105.115, when the notice to terminate the tenancy or to quit has been served upon the tenant or person in possession in the manner perscribed by ORS 91.110 and for the period prescribed by ORS 91.060 to 91.080 before the commencement of the action, unless the leasing or occupation is for the purpose of farming or agriculture, in which case such notice must be served for a period of 90 days before the commencement of the action.

(2) Any person entering into the possession of real estate under written lease as the tenant of another may, by the terms of his lease, waive the giving of any notice required by this section.

(3) The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against him for the possession of premises before the expiration of any period for which the tenant or person has paid the rent of the premises in advance.

105.125 Complaint. In an action pursuant to ORS 105.110 it is sufficient to state in the complaint:

(1) A description of the premises with convenient certainty;

(2) That the defendant is in possession of the premises;

(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

(4) That the plaintiff is entitled to the possession of the premises.

105.130 How action conducted. Except as provided in ORS 105.135 to 105.160 an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

105.135 Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

105.140 Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

105.145 Judgment on trial by court. If the action is tried by the court without a jury, and after hearing the evidence it concludes that the complaint is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable.

105.150 Verdict and judgment on trial by jury. If the action is tried by a jury and they find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, they shall render a general verdict of not guilty; if true in part, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict.

105.155 Form of execution. The execution, should judgment of restitution be rendered, may be in the following form:

STATE OF OREGON)
) ss
COUNTY OF _____)

To the sheriff or any constable of the county:

Whereas, a certain action for the forcible entry and detention, (or the forcible detention) of the following described premises, to wit: _____ _____, lately tried before the above entitled court, wherein _____ was plaintiff and _____ was defendant, judgment was rendered on the _____ day of _____, A.D., _____, that the Plaintiff _____ have restitution of the premises, and also that he recover the costs and disbursements in the sum of $_____;

In the name of the State of Oregon, you are, therefore, hereby commanded to cause the defendant and his goods and chattels to be forthwith removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and chattels of the defendant, and make the

costs and disbursements, aforesaid, and all accruing costs, and to make legal service and due return of this writ.

Witness my hand and official seal (if issued out of a court of record) this _____ day of _____, A.D., _____.

Justice of the peace, or clerk of the district or circuit court.

105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action.

105.165 to 105.200 (Reserved for expansion.)

V.

27. The provisions of Oregon Revised Statute, Sections 105.105, et seq., were enacted and continue to exist in contravention to the United States Constitution and the Constitution of the State of Oregon in the following particulars:

(a) Section 105.125 (3) and (4) does not require the plaintiff in an action for Forcible Entry and Wrongful Detainer to allege facts supporting his cause of action with particularity to enable the defendant to have sufficient notice of plaintiff's grounds and rights to which

he may respond and these provisions are violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon, and further, are violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and,

(b) Section 105.135 does not provide adequate time for that defendant to investigate, obtain counsel, or prepare a defense to an action for Forcible Entry and Wrongful Detainer and this provision is violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and further is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and,

(c) Section 105.140 permits only a two-day continuance without payment of money as security which provision is violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and further is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and,

(d) Sections 105.145 and 105.150 do not permit that defendant to raise other equiable and meritorious substantive defenses to the action for Forcible Entry and Wrongful Detainer such as illegality of contract for plaintiff's violation of Housing Codes or plaintiff's breach of warranty that the property is habitable or fit for the particular purpose intended, etcetera, and said provisions

are violative of that defendant's right to due process of law as guaranteed by the fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and further is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and,

(e) Section 105.115 defines the causes of unlawful holding by the defendant and leaves no latitude to include other equitable and meritorious substantive justifications for holding the property in question, such as those given as examples in sub-part (d) of this paragraph, and said provisions are violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of tht Constitution of the State of Oregon and further is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and,

(f) Section 105.160 provides that if judgment is rendered against the defendant, he must post money or security to protect his rights in an appeal, which provision is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and,

(g) Sections 105.105, et seq., provide for a summary disposition in a procedure that is unbalanced and weighted in favor of one party, to wit: the plaintiff, and as such is violative of the defendant's right to due process of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and further is violative of the defendant's right to equal privileges and immunities and equal pro-

tection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon.

VI.

28. The Plaintiffs, DONALD LINDSEY and EDNA LINDSEY, are tenants in a dwelling that has been declared substandard by the Bureau of Buildings of the City of Portland and, to date, no attempt at repairs has been made by the Defendant-Landlords, and said Defendant-Landlords have threatened the eviction of said Plaintiffs. For their cause of action, said Plaintiffs set forth the following:

(a) As previously more fully set forth herein, the eviction procedure is unconstitutional and void;

(b) That said Defendant-Landlords have a duty to repair the Housing Code violations, and maintain the premises in a habitable condition;

(c) That said Defendant-Landlords have a duty to refrain from taking retaliatory measures against said Plaintiffs as a result of this action or as a result of reporting Housing Code violations or as a result of Plaintiffs withholding rent to compel the Defendant-Landlords to repair the premises.

29. The Plaintiff, EVARET SNYDER, is a tenant in a multiple dwelling, in whose apartment there exists conditions in violation of the Housing Code of the City of Portland which said Plaintiff has requested repair by the Defendant-Landlords and which said Defendant-Landlords have failed, or otherwise refused, to repair and said Defendant-Landlords have threatened said Plaintiff's eviction. For his cause of action, said Plaintiff sets forth the following:

(a) As previously more fully set forth herein, the eviction procedure is unconstitutional and void;

(b) That said Defendant-Landlords have a duty to repair the Housing Code violations, and maintain the premises in a habitable condition;

(c) That said Defendant-Landlords have a duty to refrain from taking retaliatory measures against said Plaintiff as a result of this action or as a result of reporting Housing Code violations or as a result of Plaintiff's withholding rent to compel the Defendant-Landlords to repair the premises.

30. The Plaintiff, KEITH L. OETTING, is a tenant in a dwelling in which there exists conditions in violation of the Building and Health Codes of the County of Multnomah, which said Plaintiff has requested repair by the Defendant-Landlord and which said Defendant-Landlord has failed or otherwise refused to repair and said Defendant-Landlord has instituted an action of Forcible Entry and Wrongful Detainer pursuant to Oregon Revised Statute Sections 105.105, et seq., in the District Court of the State of Oregon for the County of Multnomah at No. 75743. For his cause of action, said Plaintiff sets forth the following:

(a) As previously more fully set forth herein, the eviction procedure is unconstitutional and void;

(b) At the hearing before the Honorable District Court Judge Shoemaker, said Plaintiff was prevented from asserting the defenses of unconstitutionality of the State procedure, ORS § 105.105, et seq., and the defenses of illegality of contract, breach of warranties of fitness and habitability, failure of consideration, breach of covenants of quiet enjoyment, plaintiff-landlord's unclean hands, and public policy as absolute defense to the eviction proceeding;

(c) That said Defendant-Landlord has a duty to repair the Housing Code violations, and maintain the premises in a habitable condition;

(d) That said Defendant-Landlords have a duty to refrain from taking retaliatory measures against said Plaintiff as a result of this action, or as a result of reporting Housing Code violations, or as a result of Plaintiff withholding rent to compel the Defendant-Landlords to repair the premises.

31. The Plaintiffs, RANDALL LOWE and MARJORIE LOWE, tenants in a dwelling in whose apartment

there exists conditions in violation of the Housing Code of the City of Portland, which said Plaintiffs have requested repair by the Defendant-Landlords and which said Defendant-Landlords have failed or otherwise refused to repair and said Defendant-Landlords have threatened said Plaintiffs' eviction. For their causes of action, said Plaintiffs set forth the following:

(a) As previously more fully set forth herein, the eviction procedure is unconstitutional and void;

(b) That said Defendant-Landlords have a duty to repair the Housing Code violations, and maintain the premises in a habitable condition;

(c) That said Defendant-Landlords have a duty to refrain from taking retaliatory measures against said Plaintiff as a result of this action or as a result of reporting Housing Code violations or as a result of Plaintiffs' withholding rent to compel the Defendant-Landlords to repair the premises.

(d) That said Defendant WILLIAM C. BEERS, had a duty to permit them to raise these various equitable and meritorious defenses at the State Court action.

32. The Plaintiffs, PRINCESS THOMAS and MARIE DUNNE, are tenants in a multiple dwelling and have been told by Dorothy Brauser, manager and agent of said Defendant-Landlords, to vacate the premises or face eviction proceedings because they are presently on welfare and they refused to divulge the details of their welfare grants to said manager. For their causes of action, said Plaintiffs set forth the following:

(a) As previously more fully set forth herein, the eviction procedure is unconstitutional and void;

(b) That said Defendant-Landlords have a duty to refrain from evicting said Plaintiffs because said Plaintiffs exercised a constitutional right in applying for welfare payments;

(c) That said Defendant-Landlords have no right to compel the divulgence of confidential and privileged information by threatening eviction or, in fact, evicting said Plaintiff-Tenants from their residence.

VII.

33. There exists in the County of Multnomah, State of Oregon, a shortage of housing, in particular low-cost housing for low-income families.

34. The condition of many available low-cost housing units is substandard and/or in violation of the Housing Codes of the City of Portland and County of Multnomah.

35. By virtue of the existence of a shortage of housing, the landlords are in the position of dictating the terms of rental agreements and compelling prospective tenants to accept adhesion leases and substandard conditions which, under these conditions, the landlord is not inclined to repair.

36. To compel low-income persons, or any individual, to accept such substandard conditions by virtue of the inaction of the courts and the Bureau of Buildings in compelling landlords to repair substandard conditions is a violation of the Plaintiffs' constitutional rights in that;

(a) it deprives them of property without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Oregon Constitution;

(b) it deprives them of equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Oregon Constitution;

(c) it deprives them of equal privileges and immunities as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I Section 20 of the Oregon Constitution.

VIII.

37. Said Defendants, WILLIAM C. BEERS and all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah, by deciding lawsuits pursuant to Oregon Revised Statute Sections 105.105, et seq., have violated and are continuing to violate the Plaintiffs' civil rights and are acting in contravention to the Constitution of

the United States and of the State of Oregon as outlined in Paragraph 27 of this Complaint.

IX.

38. The Plaintiffs are persons of low income means.

39. The Plaintiffs would have difficulty in relocating to new dwellings.

40. The cost of moving and relocating is burdensome and oppressive to these Plaintiffs.

41. Even if Plaintiffs are eligible for public housing, there is approximately a six to eight months waiting period before such housing is available in the City of Portland.

42. The Plaintiffs would be caused irreparable harm if compelled to relocate at this time.

43. The Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for relief that:

(a) This Court convene a three-judge District Court as required by 28 USCA, Sections 2281 to 2284;

(b) This Court declare Oregon Revised Statute Sections 105.105, et seq., unconstitutional and void;

(c) This Court declare that proceedings instituted pursuant to the procedures of Oregon Revised Statute Sections 105.105, et seq., are unconstitutional and void;

(d) This Court declare Oregon Revised Statute Sections 105.115, 105.125 (3) and (4), 105.135, 105.140, 105.145, 105.150, and 105.160, unconstitutional and void;

(e) This Court declare that for an action of Forcible Entry and Wrongful Detainer to be constitutional and enforceable, it must permit sufficient time prior to the hearing within which the defendant may investigate, obtain counsel, and prepare a defense to such action for Forcible Entry and Wrongful Detainer;

(f) This Court declare that for an action of Forcible Entry and Wrongful Detainer to be constitutional and enforceable, it must permit the raising of any substantive meritorious defenses and due consideration given thereof by the State Court with specific rulings thereon, any of which defenses may be an absolute defense to the action of Forcible Entry and Wrongful Detainer;

(g) This Court declare that for the undertaking requirement for obtaining continuances beyond the time as set by Paragraph (e) to be constitutional and valid, it shall be limited to and in no event, greater than the payment of the current monthly rent or term of rent due, into the Court to be held in escrow until all matters be determined by a full and fair hearing;

(h) This Court declare that for the undertaking requirement or bond for appealing the lower court determination to be constitutional and valid; it shall be limited to and in no event greater than the payment of the rents declared due by the lower court to be held in escrow until the appeals are determined;

(i) This Court declare that any action for Forcible Entry and Wrongful Detainer which does not comply with the requirements of Paragraphs e, f, g, and h of Plaintiffs' prayer for relief shall be unconstitutional and void and, therefore, unencorceable;

(j) This Court declare that the Defendant-Landlords have a duty to repair any housing code violations that exist in any of the premises described herein and a further duty to maintain the premises in a habitable condition;

(k) That this Court declare that a landlord who wrongfully or negligently permits his property to be in violation of housing and sanitary code standards has violated the constitutional rights of the tenant;

(l) That if the landlord refuses to repair said housing and sanitary code violations or negligently permits their continued existence, the landlord may be liable for a tort action by the tenant to said tenant for damages;

(m) This Court declare that a tenant has the right to exercise or attempt to exercise constitutional rights or statutory rights without fear of being evicted from his dwelling because of his exercise of those rights;

(n) This Court declare that Defendants WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and all persons similarly situated holding office as Judges of the District Court for the State of

Oregon, have a duty to hear actions brought pursuant to Oregon Revised Statute Sections 105.105, et seq., in accordance with Paragraphs (e) through (i) of this prayer for relief;

(o) This Court grant a temporary restraining order against each of said Defendants, restraining them from taking any action for possession of the premises or pursuing any action already instituted to obtain possession of the premises pursuant to their individual factual situations;

(p) This Court grant a preliminary injunction and, thereafter, a permanent injunction against said Defendants, enjoining them from utilizing the provisions of Oregon Revised Statute Sections 105.105, et seq., against the named Plaintiffs to this action;

(q) This Court grant any further relief as may be necessary and proper.

LEGAL AID SERVICE

By: /s/ John H. Clough, Esquire
Director,
Trial & Appellate Div.

/s/ Charles J. Merten, Esquire
Director, Legal Aid Service

JOSEPH C. MOREHEAD, Esquire

/s/ Kenneth J. Keller, Esquire

/s/ Mervyn H. Loya, Esquire
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, ET AL., PLAINTIFFS
vs.
WILLIAM E. SKOURTES, ET AL., DEFENDANTS

MOTION FOR DETERMINATION OF CLASS ACTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE NUMBER 23 (c) (1)—Filed January 20, 1970

Plaintiffs move that pursuant to Federal Rule of Civil Procedure Number 23 (c) (1) this Court enter an Order determining that this suit shall be maintained as a class action on behalf of themselves and all persons similarly situated who are, have been, or will be affected by the operation of Oregon Revised Statute, Sections 105.105, et seq., on the grounds that it appears from their Complaint on file herein and their testimony in support of their motions for temporary restraining orders and application for leave to proceed in forma pauperis that they meet the requirements of Federal Rules of Civil Procedure Numbers 23 (a) and 23 (b) (1 & 2).

Plaintiffs further move that this Court define the class as all those persons in the State of Oregon who are, have been, or will be, affected by the operation of Oregon Revised Statute, Sections 105.105, et seq.

LEGAL AID SERVICE

By: /s/ John H. Clough
JOHN H. CLOUGH, Esquire
Director,
Trial & Appellate Division

POINTS AND AUTHORITIES

Wright, "Class Actions", 47 FRD 169 (1969)

Cypress v. *Newport News General Hospital*, C A 4th 1967, 375 F 2d 648

Illinois v. *Harper & Row Publishers, Inc.*, D C Ill. 1969, 301 F Supp. 484

Eisen v. *Carlisle & Jacquelin, et al*, CA 2nd 1968, 391 F.2d 555

Norwalk CORE v. *Norwalk Redevelopment Agency*, CA 2nd 1968, 395 F 2d 920

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, ET AL., PLAINTIFFS

vs.

WILLIAM E. SKOURTES, ET AL., DEFENDANTS

ORDER OF COURT—Filed January 21, 1970

AND NOW, to wit, this 20th day of January, 1970, upon consideration of the Plaintiffs' Motion for Determination of class action, and upon hearing arguments of counsel, it is specifically found that on the face of the pleadings and from the offers of proof of counsel and arguments thereon, that the proposed class of Plaintiffs meet the requirements of Federal Rule of Civil Procedure Numbers 23 (a) and 23 (b) (1 & 2) for the maintenance of a class action.

IT IS HEREBY ORDERED that the Plaintiffs are granted leave to maintain this action as a class action pursuant to Federal Rules of Civil Procedure Numbers 23 (a) and 23 (b) (1 & 2). The class is hereby defined as all those persons in the State of Oregon who are, have been, or may be affected by the operation of Oregon Revised Statute, Sections 105.105, et seq.

This ORDER is to remain in full force and effect unless the full court modifies or amends this ORDER.

BY THE COURT

/s/ Alfred T. Goodwin
Judge

PRESENTED BY:

/s/ John H. Clough
JOHN H. CLOUGH, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, ET AL., PLAINTIFFS

vs.

WILLIAM E. SKOURTES, ET AL., DEFENDANTS

ORDER OF COURT—Filed January 21, 1970

AND NOW, to wit, this 20th day of January, 1970, upon consideration of the Plaintiffs' offers of proof of their individual testimony as presented to this Court and upon arguments of counsel, it is specifically found that:

1. DONALD LINDSEY and EDNA LINDSEY reside at 3732 S. E. Grant Court, City of Portland, with their three children, and that DONALD LINDSEY is confined to a wheel chair because of crippling arthritis.
2. EVARET SNYDER resides alone at Apartment 3, 1224 S. E. Belmont, City of Portland, is 74 years of age and is, or was, a diabetic still required to take refrigerated medicine.
3. RANDALL and MARJORIE LOWE reside at 3822 N. E. 66th Avenue, City of Portland, with their two children and that RANDALL LOWE suffered a heart ailment requiring him to be off work for close to three months at the end of 1969.
4. PRINCESS THOMAS and MARIE DUNNE reside at Apartment 6, 2412 N. E. Union Avenue, City of Portland, and that PRINCESS THOMAS is under medical treatment at the present time.
5. DONALD and EDNA LINDSEY, EVARET SNYDER, RANDALL and MARJORIE LOWE, PRINCESS THOMAS and MARIE DUNNE, because of their low income, would suffer irreparable harm if this Order were not granted, in that they may be evicted and forced to accept housing in worse condition that they presently

occupy or may suffer financial expenses, placing them in difficult financial status from which they may be a long time recovering.

THEREFORE, it is hereby ORDERED that, to prevent irreparable harm and preserve the status quo, a temporary restraining order is hereby granted to the named Plaintiffs, DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, and MARIE DUNNE, restraining the Defendants, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and ALL PERSONS SIMILARLY SITUATED, HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, from entering judgment or ordering execution on any action brought or that may be brought by the other named Defendants against the above named Plaintiffs, pursuant to Oregon Revised Statute, Sections 105.105, et seq.

IT IS FURTHER ORDERED, that the Plaintiffs, DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, RANDALL LOWE and MARJORIE LOWE, are to pay their back rent or give security therefor, and continue rent payments as they fall due to Legal Aid Service, which money is to be held by Legal Aid Service in a separate trust account until disposition of the funds is ordered by this Court.

IT IS FURTHER ORDERED that the Plaintiffs, PRINCESS THOMAS and MARIE DUNNE, are to continue to make their rent payments as usual, since it has been represented to the Court that there is no claim of substandard conditions existing in their dwelling.

This Temporary Restraining Order is to remain in full force and effect until the hearing and determination by the full court.

BY THE COURT

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
Judge

THIS ORDER CONSENTED TO:

PRESENTED BY:

/s/ John H. Clough
JOHN H. CLOUGH, Esquire
Of Attorneys for Plaintiffs

/s/ * Thomas J. Lekas
THOMAS J. LEKAS, Esquire
Attorney for Dorthea M. Normet

/s/ A. W. Metzger
A. W. METZGER, Esquire
Attorney for Orville & Vivian Grubb

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* I consent to the order except paragraph 5 as it pertains to what irreparable harm the plaintiffs Lindsey may suffer.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, ET AL., PLAINTIFFS

vs.

WILLIAM E. SKOURTES, ET AL., DEFENDANTS

ORDER OF COURT—Filed January 21, 1970

AND NOW, to wit, this 20th day of January, 1970, upon consideration of the Plaintiffs' offer of proof of their individual testimony as presented to this Court and upon hearing arguments of counsel, it is specifically found that:

1. Plaintiffs, DONALD and EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL and MARJORIE LOWE, PRINCESS THOMAS and MARIE DUNNE, are without sufficient funds to pay the costs or give security therefor for the prosecution of this action.
2. Said Plaintiffs believe that they are entitled to relief in this action.
3. Said Plaintiffs have raised a justiciable issue in this action.

THEREFORE, it is ORDERED that each of said Plaintiffs are granted leave to proceed in forma pauperis pursuant to 28 USCA Sec. 1915.

BY THE COURT

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
Judge

PRESENTED BY:

/s/ JOHN H. CLOUGH
JOHN H. CLOUGH, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, ET AL., PLAINTIFFS

vs.

WILLIAM E. SKOURTES, ET AL., DEFENDANTS

ANSWER OF DEFENDANT DOROTHEA H. NORMET TO PLAINTIFFS' AMENDED COMPLAINT—Filed March 13, 1970

Comes now defendant DOROTHEA M. NORMET and for her answer to plaintiffs' amended complaint admits, denies and alleges as follows:

I.

Answering Paragraph I, denies the allegations contained in subparagraph 1, except admits that this is a civil action on behalf of plaintiffs for a declaratory judgment of the unconstitutionality of the Oregon Revised Statute Sections 105.105, et seq., temporary restraining order and injunction, and admits allegations in subparagraphs 2 and 3.

II.

Answering Paragraph II, denies the allegations therein, except admits that plaintiffs DONALD LINDSEY and EDNA LINDSEY, husband and wife, reside at 3732 S. E. Grant Court, City of Portland, County of Multnomah, State of Oregon.

III.

Answering Paragraph III, denies the allegations contained therein, except admits that defendant NORMET is the holder of the record title to the premises occupied by the plaintiffs LINDSEY and LINDSEY at 3732 S. E. Grant Court, Portland, Oregon, and that her interest in

said premises is subject to an outstanding contract of sale and the rights of the contract purchasers' assignee, Jim Hines.

IV.

Answering Paragraph IV, admits that Oregon Revised Statute, Sections 105.105, et seq., reads substantially as alleged.

V.

Answering Paragraph V, denies the allegations therein.

VI.

Answering Paragraph VI, denies the allegations therein, except admits the plaintiffs LINDSEY and LINDSEY are in possession and occupy the premises at 3732 S. E. Grant Court, Portland, Oregon, and that the dwelling on said premises has been declared substandard and ordered vacated by the Bureau of Buildings of the City of Portland.

VII.

Answering Paragraphs VII, VIII and IX, denies the allegations therein.

Defendant NORMET alleges the following affirmative defenses:

FIRST DEFENSE

Plaintiffs' amended complaint fails to state a claim against defendant NORMET upon which relief can be granted.

SECOND DEFENSE

Plaintiffs have failed to join indispensable parties to this suit.

THIRD DEFENSE

Plaintiffs, prior to commencing this suit, failed to have a final settlement or determination of their claims by the courts of the State of Oregon.

FOURTH DEFENSE

That a landlord-tenant relationship does not exist between defendant NORMET and plaintiffs LINDSEY and LINDSEY.

WHEREFORE, defendant NORMET prays that plaintiffs' amended complaint be dismissed and plaintiffs take nothing thereby and defendant NORMET have her costs of suit incurred herein and such other relief as may be proper.

/s/ Theodore B. Jensen
THEODORE B. JENSEN
Of Attorneys for Defendant
Dorothea M. Normet

[Certificate of Service (Omitted in Printing)]

[Lodged 6-17-70]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, MARIE DUNNE, BONNIE L. COLTON, and all other persons similarly situated, PLAINTIFFS

vs.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH; DONALD DALE TIMMONS, HOWARD D. STEINBACH and his wife, MARION STEINBACH and STANLEY E. HARTMAN, individually and in their capacities as officers and/or agents of the Belmont East Corporation, DEFENDANTS

PRE-TRIAL ORDER—Filed June 18, 1970

As a result of conferences heretofore held among counsel, the following issues of fact and law were framed and exhibits identified:

I

STATEMENT OF JURISDICTION
AND
NATURE OF PROCEEDINGS

This is a civil action brought by the individual named Plaintiffs on their own behalf and on the behalf of a class of persons defined as all those persons similarly situated who have been, are being, or may be affected by the operation of Oregon Revised Statute, Sections

105.105, et seq., commonly known as the Forcible Entry and Wrongful Detainer Law, against various Defendants who Plaintiffs contend represent the landlords of the respective named Plaintiffs and the Honorable William C. Beers, individually and in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and as representative of a class of Defendants defined as all those persons similarly situated who are holding office as Judges of the District Court of the State of Oregon for the County of Multnomah.

The Plaintiffs seek to obtain a declaratory judgment that the provisions of Oregon Revised Statute, Sections 105.115, 105.125 (3 and 4), 105.135, 105.140, 105.145, 105.150, and 105.160, are unconstitutional and void and that proceedings instituted thereunder are unconstitutional and void and unenforceable; and to obtain a preliminary injunction, thereafter to be made permanent, to restrain the enforcement of the aforesaid objectionable statutory provisions.

The jurisdiction of this Court has been invoked pursuant to Title 28 USC Sections 1343, 2201 and 2202, and Title 42 USC Section 1983.

II.

AGREED FACTS

A. Statement of Agreed Facts between Plaintiffs, Donald Lindsey and Edna Lindsey, and Defendant, Dorothea M. Normet.

1. Donald Lindsey and Edna Lindsey are individuals, citizens of the United States and of the State of Oregon, who reside with their three children, ages 14, 10, and 9, at 3732 S. E. Grant Court, City of Portland, County of Multnomah, State of Oregon.

2. Donald and Edna Lindsey and their family originally rented said premises from Jim Hines and have been, and now are, occupying the premises as tenants, with the monthly rental payments being $100, per month.

3. Dorothea M. Normet is the record title holder to the property located at 3732 S. E. Grant Court, City of Portland, County of Multnomah, State of Oregon.

4. Dorothea M. Normet has requested and received rental payments for the aforesaid premises in the amount of $100 per payment for the months of August, September, October, and November of 1969.

5. The Bureau of Buildings of the City of Portland, Oregon, on November 10, 1969, declared the dwelling at the aforesaid premises unfit for habitation due to substandard conditions, including rusted gutters, broken windows, broken plaster, missing rear steps, improper sanitation, etc.

6. Notice that the dwelling at the aforesaid premises was in violation of the Housing Codes of the City of Portland, and that the owner, agent or occupant of said dwelling was required before 30 days to vacate the structure or show cause to the Bureau of Buildings of the City of Portland why said dwelling should not be vacated was, on November 10, 1969, posted on the front door of said dwelling and a copy of said notice sent by Certified Mail No. 847239 to the record deed holder, William E. Skourtes, which Certified Mail was received and delivered on November 15, 1969, signed William E. Skourtes by his agent, Dorothea Normet.

7. Donald Lindsey and Edna Lindsey, or their agents or counsel, have requested of Dorothea M. Normet, or her agents or counsel, to repair various conditions on the aforesaid premises. Dorothea M. Normet did not make said repairs, except that she arranged for plywood to be nailed across one of the windows.

8. That the interest of Dorothea M. Normet as the record owner of the premises occupied by Defendants Donald Lindsey and Edna Lindsey at 3732 S. E. Grant Court, Portland, Oregon, is subject to

an outstanding contract of sale, dated May 25, 1961, in which the purchaser is Bernice Reed, who subsequently assigned her buyer's interest in the contract to Jim Hines.

9. That Defendant Dorothea M. Normet has commenced, and there is now pending in the Circuit Court of the State of Oregon for the County of Multnomah, a suit to foreclose such contract and the buyer's interest therein.

10. That the rent payments received by the Defendant, Dorothea M. Normet, from the Plaintiffs, Donald Lindsey and Edna Lindsey, were received by said Defendant and applied on the unpaid balance due on said contract of sale of said property.

11. On the 15th day of December, 1969, the Defendant Dorothea M. Normet by her attorney, Thomas J. Lekas, wrote to the Plaintiffs Mr. and Mrs. Donald Lindsey in regard to the premises at 3732 S. E. Grant Court, Portland, Oregon. Said letter speaks for itself. (Plaintiffs' Exhibit 14.)

12. If an FED action, pursuant to Oregon Revised Statutes, was brought against them by the Defendant Dorothea M. Normet, the said Plaintiffs would raise equitable and affirmative defenses similar to those raised in *Grubb* v. *Lowe*, No. 76728, District Court of the State of Oregon for the County of Multnomah, and *Aluminum Window Products Co.* v. *Oetting*, No. 354795 in the Circuit Court of the State of Oregon for the County of Multnomah. (See Plaintiffs' Exhibits 1 and 2 herein.)

B. Evaret Snyder vs. Donald Dale Timmons, Howard D. Steinbach and his wife, Marion Steinbach, and Stanley E. Hartman, individually and in their capacities as officers and/or agents of the Belmont East Corporation.

1. Evaret Snyder is an individual, citizen of the United States and of the State of Oregon who resides at Apartment 3, 1224 S. E. Belmont, City of Portland, County of Multnomah, State of Oregon.

2. Evaret Snyder is a tenant of the Belmont East Corporation and his monthly rental of the aforementioned premises is set at $40 per month.

3. The officers, agents and/or owners of the Belmont East Corporation are Donald Dale Timmons, Howard D. Steinbach and his wife, Marion Steinbach, and Stanley E. Hartman.

4. Evaret Snyder has withheld rent to compel the landlord to repair certain conditions in his apartment which allegedly render it substandard and in violation of the Housing Code and Building Code of the City of Portland, Oregon. (Plaintiffs' Exhibits 15-24, 38-44.)

5. The Defendant-landlords individually or through their agents, servants, or employees, have threatened Evaret Snyder with eviction for non-payment of rent.

6. If an action were brought pursuant to Oregon Revised Statute, Sections 105.105, et seq., Evaret Snyder would raise defenses similar to those raised in the State Court actions brought against Randall Lowe and Keith L. Oetting. (Plaintiffs' Exhibits 1 & 2.)

C. Bonnie L. Colton (vs Gene W. Rossman, individually and in his capacity as Executive Director of the Housing Authority of Portland, Oregon; and the Housing Authority of Portland, Oregon; and Richard McGowan, et ux.)

1. Bonnie L. Colton is an individual, citizen of the United States and of the State of Oregon, residing with her four children at 5105 N. E. 24th Street, City of Portland, County of Multnomah, State of Oregon.

2. Bonnie L. Colton and her family are tenants of the Housing Authority of Portland, Oregon, and her monthly rental of the aforementioned premises is set at $40.50 per month.

3. The record title holders of the aforementioned property are Richard McGowan, et ux, who have executed a lease to the Housing Authority of Portland, Oregon, under their "leased housing" program whereby the Housing Authority is permitted to sublease the said premises to eligible persons at a rental to be determined according to need by the Housing Authority, guaranteeing the owner a specified monthly rental.

4. The Housing Authority of Portland, Oregon, leased the aforementioned premises to Bonnie L. Colton.

5. Gene W. Rossman is the Executive Director of the Housing Authority of Portland, Oregon, a public corporation.

6. The Housing Authority of Portland, Oregon, through its officers, agents, servants or employees first threatened then filed an action of Forcible Entry and Wrongful Detainer against Bonnie L. Colton at Number 78337, in the District Court of the State of Oregon for the County of Multnomah.

7. Bonnie L. Colton has raised several affirmative defenses to the State Court action, all of which are more fully set forth in the answer to the complaint filed therein. (Plaintiffs' Exhibit 47.)

8. Bonnie L. Colton had pending in this lawsuit an action for damages to recover the amount of excess utility bills she has incurred and for punitive damages, subject to the Housing Authority of Portland's claim that there is no jurisdiction and no merit to the claim. (See Paragraph IX.)

9. By agreement of counsel and consent of the District Court Judge, William C. Beers, because Plaintiff's counsel raises no objections, Bonnie L. Colton will be permitted to raise all of her affirmative defenses in the State Court action.

D. Keith L. Oetting (vs Edith Manning, individually and in her capacity as Secretary-Treasurer of Aluminum Window Products Company.)

1. Immediately prior to the hearing held by the Honorable Ray D. Shoemaker, Judge of the District Court, on December 17, 1969, in the case of Aluminum Window Products Company vs. Keith L. Oetting, at Number 75743 in the District Court of the State of Oregon for the County of Multnomah, counsel for Keith L. Oetting served upon counsel for Aluminum Window Products Company, Donald L. Alderton, an answer which formally raised two affirmative defenses of constitutionality of the proceeding and illegality of contract.

2. At oral argument before the Honorable Judge Ray D. Shoemaker, counsel for Keith L. Oetting argued the aforementioned defenses and raised orally the defenses of failure of consideration, warranty of fitness of habitability, unclean hands, and public policy.

3. Edith Manning was asked on cross examination questions concerning the condition of the premises to which her counsel, Donald L. Alderton, objected as subject not having been gone into on direct testimony; which objection was overruled, and she answered that the premises had been remodeled, although she, herself, had not personally inspected the interior of the premises.

4. Keith L. Oetting took the stand at the aforesaid hearing to testify as to the condition of the said premises, and when such questions were asked on direct, counsel for the Aluminum Window Products Company objected on the grounds that such testimony was irrelevant to the proceeding and was sustained by the Honorable Judge Shoemaker, with an exception noted to counsel for Keith L. Oetting.

5. The Honorable Judge Shoemaker ruled on the objection raised as aforesaid on the grounds that the defenses raised were not permitted in that pro-

ceeding since the only issue was the non-payment of rent and the questions asked on direct were irrelevant.

6. The Honorable Judge Shoemaker then ordered the case transferred to Circuit Court because it involved a written lease for a period of one year.

7. The case at Number 75743 in the District Court of the State of Oregon for the County of Multnomah was subsequently transferred to Number 354 795 in the Circuit Court of the State of Oregon for the County of Multnomah.

8. Counsel for Keith L. Oetting subsequently filed an Amended Answer which formally raised the aforementioned defenses. (Plaintiffs' Exhibit 2.)

9. The State Court action was settled by agreement and the Defendant-landlord was dismissed from this suit.

E. Randall Lowe and Marjorie Lowe (vs. Orville G. Grubb and Vivian Grubb).

1. That Orville G. Grubb and Vivian L. Grubb are the owners of the property located at 3822 N. E. 66th Ave., City of Portland County of Multnomah, State of Oregon.

2. That Randall Lowe and Marjorie Lowe are tenants of the aforesaid property owned by Orville G. Grubb and Vivian L. Grubb.

3. That Orville G. Grubb and Vivian L. Grubb brought an action for Forcible Entry and Wrongful Detainer, pursuant to Oregon Revised Statutes, Sections 105.105, et seq., at Number 76728 in the District Court of the State of Oregon for the County of Multnomah against Randall Lowe and Marjorie Lowe.

4. Randall Lowe and Marjorie Lowe filed an answer to the State Court Complaint setting forth defenses as more fully set forth in said answer.

5. At the hearing before the Honorable William C. Beers, Judge of the District Court of the State of Oregon for the County of Multnomah, on motion of the Plaintiff-Landlords therein, all of the affirmative defenses raised in Defendant Lowe's answer were stricken as not being permitted under Oregon Revised Statute, Sections 105.105, et seq. (Plaintiffs' Exhibit 1.)

6. The State Court action was settled by agreement and the Defendant-Landlord was dismissed from this suit.

F. Princess Thomas and Marie Dunne (vs. George C. Staples, individually and in his capacity as owner and Secretary of AAA Heating and Cooling, Inc., and Dorothy Brauser.)

1. Princess Thomas and Marie Dunne are individuals, citizens of the United States and of the State of Oregon, who resided at Apartment 6, 2412 N. E. Union Avenue, City of Portland, County of Multnomah, State of Oregon.

2. The record title holder of the aforementioned premises is AAA Heating and Cooling, Inc., who leased all of the apartments located thereon to Dorothy Brauser who in turn sub-leased the apartments to tenants of her choosing.

3. Dorothy Brauser leased Apartment 6 to Princess Thomas and Marie Dunne.

4. Dorothy Brauser threatened the Plaintiffs' eviction allegedly because they were welfare recipients. (Plaintiffs' Exhibit 48.)

5. Princess Thomas and Marie Dunne have since moved from these premises.

G. Donald Lindsey, Edna Lindsey, Evaret Snyder, Keith L. Oetting, Randall Lowe, Marjorie Lowe, Princess Thomas, Marie Dunne, Bonnie L. Colton, and all other persons similarly situated, vs. The Honorable William C. Beers, in his capacity as Judge of the District Court of the State of Oregon for the County of Multno-

mah; and all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah.

1. All of the facts as more fully set forth in this Pre-Trial Statement are incorporated herein.

2. All named Plaintiffs are members of a class of persons who have been, are being, or may be affected by the operation of Oregon Revised Statute, Sections 105.105, et seq.

3. The Honorable William C. Beers is the Presiding Judge of the District Court of the State of Oregon for the County of Multnomah and is a duly elected holder of that office.

4. The Honorable William C. Beers is representative of a class of Defendants who are all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah.

5. The aforesaid District Court would hear and determine all actions that have been, in fact, brought against the named Plaintiffs in this case and would hear and determine the majority of actions brought against members of the class of Plaintiffs to this action.

6. The said Defendant Judges have in the past refused to hear any of the defenses raised by Plaintiffs in these State Court actions and Plaintiffs are advised and believe that they would continue to strike all such affirmative defenses if they are to be filed in the future. (Plaintiffs' Exhibits 1 and 2.)

7. The Defendant Judge, William C. Beers, permitted the raising of the defenses of Bonnie L. Colton in her individual case because counsel for the Housing Authority of Portland, Oregon, raised no objections thereto. (Plaintiffs' Exhibit 47.)

8. Plaintiffs are advised and believe that the aforementioned ruling is only applicable to the individual case of Bonnie L. Colton.

III.

PLAINTIFFS' CONTENTIONS

Palintiffs make the contentions that the provisions of Oregon Revised Statute, Sections 105.105, et seq., were enacted and continue to exist in contravention to the United States Constitution and the Constitution of the State of Oregon in the following particulars:

(1) Section 105.125 (3) and (4) does not require the plaintiff in an action for Forcible Entry and Wrongful Detainer to allege facts supporting his cause of action with particularity to enable the defendant to have sufficient notice of plaintiff's grounds and rights to which he may respond and these provisions are violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, are violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and

(2) Section 105.135 does not provide adequate time for that defendant to investigate, obtain counsel, or prepare a defense to an action for Forcible Entry and Wrongful Detainer and this provision is violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Oregon and, further, is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and

(3) Section 105.140 permits only a two-day continuance without payment of money as security,

which provision is violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Consitution of the State of Oregon and, further, is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and

(4) Sections 105.150 do not permit that defendant to raise other equitable and meritorious substantive defenses to the action for Forcible Entry and Wrongful Detainer such as illegality of contract for plaintiff's violation of Housing Codes or plaintiff's breach of warranty that the property is habitable or fit for the particular purpose intended, etcetera, and said provisions are violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, is violative of that defendant's right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon; and

(5) Section 105.115 defines the causes of unlawful holding by the defendant and leaves no latitude to include other equitable and meritorious substantive justifications for holding the property in question, such as those given as examples in sub-part (4) of this paragraph, and said provisions are violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Oregon and, further, is violative of that defendant's right to equal privileges and immunities and equal

protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Oregon; and,

(6) Section 105.160 provides that if judgment is rendered against the defendant, he must post money or security to protect this rights in an appeal, which provision is violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Oregon and, further, is violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Oregon; and,

(7) Sections 105.105, et seq., provide for a summary disposition in a procedure that is unbalanced and weighted in favor of one party, to wit: the plaintiff and, as such, is violative of the defendant's right to due process of the law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Oregon and, further, is violative of the defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon.

(8) Plaintiffs contend that at the time of the filing of the suit herein, a landlord-tenant relationship, within the meaning of Oregon Revised Statute, Sections 105.105, et seq., existed between the Plaintiffs Donald and Edna Lindsey and the Defendant Dorothea Normet. Plaintiffs further contend that said landlord-tenant relationship existed prior to the said

filing of this lawsuit and subsequent to the said filing and, in fact, still exists.

(9) Plaintiffs contend that depositions to be taken for Defendant Dorothea N. Normet by her attorneys of record in regard to the procedural aspects of FED actions in the State of Oregon are not necessary and are irrelevant and immaterial.

(10) Plaintiffs contend that the Three-Judge Court herein cannot invoke the doctrine of abstention for failure to exhaust state remedies, because such doctrine is not applicable herein. The Supreme Court of the United States has held, in cases which will be cited in Plaintiffs' Legal Memorandum and later filed, that the doctrine of abstention does not apply to suits brought under Title 42 U.S.C. Section 1983.

IV.

DEFENDANTS' CONTENTIONS

A. Defendant, Dorothea M. Normet, makes the following contentions:

1. That Sections 105.105, et seq., the provisions of ORS are constitutional and are not in contravention to the Constitution of the United States or the Constitution of the State of Oregon;

2. Denies the Plaintiffs' contention that Section 105.105, et seq., of ORS are unconstitutional;

3. That the Court should invoke the doctrine of abstention in this case against the Plaintiffs and in favor of the Defendant for the reason that there has been no exhaustion of State remedies;

4. That the relationship of landlord-tenant does not exist between the Defendant, Dorothea M. Normet, and the Plaintiffs, Donald Lindsey and Edna Lindsey.

V.

ISSUES OF FACT

There are no issues of fact to be determined by this Court.

VI.

ISSUES OF LAW

The following are the issues of law to be determined by the Court:

1. Is Oregon Revised Statute, Section 105.125 (3) and (4), which does not require the plaintiff in an action for Forcible Entry and Wrongful Detainer to allege facts supporting his cause of action with particularity, violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, is it violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon?

2. Is Oregon Revised Statute, Section 105.135, which requires a hearing to be held within two to four days, violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, is it violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon?

3. Is Oregon Revised Statute, Section 105.140, which permits only a two-day continuance without payment of money as security, violative of that defendant's right to due process of law as guaranteed

by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, is it violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon?

4. Does Oregon Revised Satute, Sections 105.145 and 105.150, which does not permit that defendant to raise other equitable and meritorious substantive defenses to the action for Forcible Entry and Wrongful Detainer, violate that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, are they violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon?

5. Is Oregon Revised Statute, Section 105.115, which defines the causes of unlawful holding by the defendant, violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, is it violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon?

6. Is Oregon Revised Statute, Section 105.160, which provides that if judgment is rendered against the defendant, he must post money or security to protect his rights in an appeal, violative of that defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the

United States Constitution and Article I, Section 10 of the Constitution of the State of Oregon and, further, is it violative of that defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon?

7. Does Oregon Revised Statute, Sections 105.105, et seq., provide for a summary disposition in a procedure that is unbalanced and weighted in favor of one party, to wit: the plaintiff, violate the defendant's right to due process of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Atricle I, Section 10 of the Constitution of the State of Oregon and the defendant's right to equal privileges and immunities and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 20 of the Constitution of the State of Oregon?

8. At the time of the filing of the action herein, was there a landlord-tenant relationship, within the meaning of Oregon Revised Statute, Sections 105.105, et seq., existing between Plaintiffs Donald Lindsey and Edna Lindsey and Defendant Dorothea M. Normet?

9. Should the three-judge Court herein invoke the doctrine of abstention?

10. Are the Oregon Revised Statutes, pertaining to the FED and eviction proceedings, in violation of the Constitution of the United States and the Constitution of the State of Oregon?

VII.

EXHIBITS

The following exhibits were produced and marked, and may be received in evidence, if otherwise admissible, without further authentication. Except as hereinafter noted, each is what it purports to be:

PLAINTIFFS' EXHIBITS

1. Certified copies of all pleadings in the case of *Grubb* vs. *Lowe*, at No. 76728 in the District Court of the State of Oregon for the County of Multnomah. (Identified and admitted into evidence.)

2. Certified copies of all pleadings in the case of *Aluminum Window Products Co.* vs. *Oetting*, at No. 354-795 in the Circuit Court of the State of Oregon for the County of Multnomah. (Identified and admitted into evidence.)

3. Certified copies of the records of the Bureau of Building Inspections of the City of Portland, Oregon, concerning the Lindsey dwelling. (Identified only.)

4. Photograph of Lindsey residence. Front exterior view. (Identified and admitted into evidence.)

5. Photograph of Lindsey residence. North half of kitchen ceiling. (Identified and admitted into evidence.)

6. Photograph of Lindsey residence. West end of living room ceiling. (Identified and admitted into evidence.)

7. Photograph of Lindsey residence. The only bathroom facility on the main floor. (Identified and admitted into evidence.)

8. Photograph of Lindsey residence. First floor bathroom. (Identified and admitted into evidence.)

9. Photograph of Lindsey residence. Ceiling in entry hall, first floor. (Identified and admitted into evidence.)

10. Photograph of Lindsey residence. First floor bathroom ceiling. (Identified and admitted into evidence.)

11. Photograph of Lindsey residence. Wall along top of stairs to second floor. (Identified and admitted into evidence.)

12. Photograph of Lindsey residence. Upstairs children's bedroom, showing plywood to cover windows. (Identified and admitted into evidence.)

13. Photograph of Lindsey residence. Back porch without stairs. (Identified and admitted into evidence.)

14. Copy of letter sent by Thomas Lekas, Esquire, to Donald and Edna Lindsey. (Identified only.)

15. Photograph of Snyder residence. Front exterior view. (Identified only.)

16. Photograph of Snyder residence. Walk way on west side of house composed of unfinished planks set on the ground. Planks were loose and are slippery when wet. (Identified only.)

17. Photograph of Snyder residence. Same walk way—closer view. (Identified only.)

18. Photograph of Snyder residence. Mr. Snyder's refrigerator, furnished by landlord, showing wooden props that must be used to keep the door closed so that the refrigerator can function properly. (Identified only.)

19. Photograph of Snyder residence. Snyder bathroom, looking through the entrance into the kitchen. (Identified only.)

20. Photograph of Snyder residence. Bathroom light, showing frayed wiring. (Identified only.)

21. Photograph of Snyder residence. (Identified only.)

22. Photograph of Snyder residence. (Identified only.)

23. Photograph of Snyder residence. (Identified only.)

24. Deposition of Mrs. Josephine Brown, expert witness on behalf of Plaintiffs.

25. Deposition Exhibit "A". The exterior front of the Lindsey home at 3732 S. E. Grant Court doesn't look too bad from the picture but the gutters and eaves are full of holes and the porch supports are tearing loose from the roof. These details are not shown in the picture because it was taken from a distance. The expert witness is in the picture, lower center, walking down the porch steps.

26. Deposition Exhibit "B". A close-up of the Lindsey's front door and lock. The lock works only

from the inside; if fastened it can't be unlocked from the outside. The Lindseys must, therefore, wait until all family members are home at night before locking the door. Witness testifies that cats were able to push the door open and det back in when the lock was unfastened. Mrs. Lindsey has to jam the door with magazines or papers to keep it shut during the daytime. The picture also shows a thirty-day warning notice posted December 10, 1969, by the City, taped to the door window; it requires improvement of the property within thirty days of posting or eviction or removal of all occupants.

27. Deposition Exhibit "C". An interior shot of the living room ceiling with the front door in background. There is a large chunk of plaster missing from the ceiling. Mrs. Lindsey and Bobbie Tichenor are in the picture. Also shown is Mr. Lindsey's wheelchair. Witness says that she was there once when Mr. Lindsey was in the wheelchair.

28. Deposition Exhibit "D". A close-up of the main floor lavatory-toilet. The top half of the water tank is missing, the toilet doesn't work, the walls have crumbling plaster. There is also a second-story toilet that does work.

29. Deposition Exhibit "E". Another photograph of the same main-floor lavatory. It is a very narrow room, apparently a closet at one time. This room is about 8 feet long and 2 feet wide, with no faucet, tub, or sink—just a toilet. This room also opens onto a hall that leads directly to the kitchen a few feet away.

30. Deposition Exhibit "F". The ceiling of the main-floor lavatory, showing missing plaster on the ceiling and wallpaper peeling due to moisture.

31. Deposition Exhibit "G". A photograph of the kitchen ceiling, half of which is missing its plaster. There is also pictured a light fixture that doesn't work. The witness says she has seen only two ceiling-light fixtures in the entire house that work, and that the Lindseys mostly use lamps for lighting.

32. Deposition Exhibit "H". A picture from the second floor down the stairs to the main floor. The plaster is off the wall. There is no railing to aid the crippled Mr. Lindsey up and down the stairs.

33. Deposition Exhibit "I". The picture of a heating vent on the second floor in the hall; there are no heating vents in the bedrooms. There is no register guard over the vent except Mrs. Lindsey's cake rack which is there to keep children, etc., from falling in.

34. Deposition Exhibit "J". The oldest girl's bedroom in the Lindsey house. The witness is on the left. The picture shows no usable windows. They were broken and in need of replacement, and plywood was put up on the inside.

35. Deposition Exhibit "K". The same bedroom as in Exhibit "J", showing the only light source and electrical light source therein. The picture is too dark to show it, but the electrical outlet is on the wall several inches below the light fixture. The wires are bare between the base of the outlet and the electrical connection. An extra piece has been added to allow several appliances to be plugged in. A metal television set was plugged in near to these very bare wires.

36. Deposition Exhibit "L". A shot of the back porch of the Lindsey home showing the back steps to be missing. There are three exits from the house, the two others are close to the front.

37. Deposition Exhibit "M". The basement laundry room showing the washing machine torn apart and inoperable. The Lindseys have been unable to use it since they moved in.

38. Deposition Exhibit "N". This is Mr. Snyder's one-room apartment. Mr. Snyder is sitting on the bed. The picture is taken from the entry to the adjoining kitchen and bath. It shows a single light fixture hanging from the ceiling, apparently powered from the wall.

39. Deposition Exhibit "O". A close-up of the aforementioned light fixture, with another appliance plugged into it.

40. Deposition Exhibit "P". The light over Mr. Snyder's bed, attached with string and cardboard to the bed frame.

41. Deposition Exhibit "Q". A close-up of the light mentioned in Exhibit "P".

42. Deposition Exhibit "R". A photograph looking from Mr. Snyder's bedroom through his kitchen and into his bathroom. The kitchen is about 4 feet by 5 feet; the bathroom is directly off the kitchen. There are no doors or petitions between them. The bathroom is slightly larger than the kitchen. The shower is merely a shower that is set into the wall of the bedroom with a brass curtain rod in an "L" shape around the area that would be covered by a shower head. There is no drain for the shower except a hole in one side of the bathroom wall. There is no partition or raised area to keep the shower water from running off. Note also that there is no partition to separate the shower area from a leaky toilet, if that toilet should ever leak.

There is one light fixture for the kitchen and bathroom. It is in the bathroom and close to the kitchen. The kitchen fixture went out two years ago and has never been replaced, in spite of repeated complaints by Mr. Snyder. The bathroom fixture is the only power source for the refrigerator which sits in the bedroom just off the entrance. It is plugged in by an extension cord and the wiring is so thin that you can feel the power surging through it.

43. Deposition Exhibit "S". A close-up of Mr. Snyder's toilet and shower room. The toilet would not stop running when flushed the day that the witness was there.

44. Deposition Exhibit "T". A close-up of the bathroom fixture showing the extension cord plugged into it from the refrigerator. This extension cord extends clear across the kitchen from the refrigerator into the bathroom.

45. Deposition Exhibit "U". Top eight-quarter section of first page Section 2 of the Oregon Journal,

dated Tuesday, February 2, 1970, concerning Mrs. Josephine Brown's nomination as one of the Ten Women of Accomplishment for 1969; describing her activities in the field of housing in Portland, Oregon.

46. Deposition Exhibit "Y". Top half section of first page Section 2 of the Oregon Journal, dated Thursday, February 12, 1970, concerning Mrs. Josephine Brown's activities in the field of housing in Portland, Oregon.

47. Certified copies of all pleadings in the case of *Housing Authority of Portland, Oregon*, vs. *Colton*, at No. 78337 in the District Court of the State of Oregon for the County of Multnomah.

48. Copy of letter sent by Dorothy Browser to Princess Thomas and Marie Dunne.

DEFENDANTS' NORMATS EXHIBITS

1. Proceedings Dist. Ct. Mult. Cty. Housing Auth. vs. Colton.

2. Supplemental Complaint, Mult. Cty. Circuit Court #357351.

ACTION BY THE COURT

The Court has ruled that:

1. January 12 and January 20, 1970—Plaintiffs Donald Lindsey, Edna Lindsey, Evaret Snyder, Randall Lowe, Marjorie Lowe, Princess Thomas and Marie Dunne be granted a temporary restraining order against the Honorable William C. Beers and the class of judges restraining them from entering judgment or ordering execution against said named Plaintiffs on the condition that said named Plaintiffs deposit their rent into an escrow account kept by Legal Aid Service; said restraining order to remain in effect until determination of this matter by the full court.

2. January 14, 1970—Notification and Certificate signed requesting three-judge statutory court to be convened.

3. January 20, 1970—Order granting leave to maintain this action as a class action pursuant to Federal Rules of Civil Procedure Number 23 (a) and (b) (1 & 2), defining the class as all those persons in the State of Oregon who are, have been, or may be, affected by the operation of Oregon Revised Statute, Sections 105.105, et seq.

4. January 20, 1970—Order granting leave to named Plaintiffs to proceed in forma pauperis, pursuant to 28 USC Section 1915.

5. February 2, 1970—Orders dissmissing Orville G. Grubb and Vivian L. Grubb and Edith Manning, individually and in her capacity as Secretary-Treasurer of Aluminum Window Products Company, as Defendants in this case.

6. February 2, 1970—Order joining as Defendant Dorothy Brauser.

7. February 10, 1970—Order intervening Bonnie L. Colton as a plaintiff and joining Richard McGowan, et ux, and Gene W. Rossman, Fred M. Rosenbaum, and William G. Martin as Defendants and granting Bonnie L. Colton a temporary restraining order against the Honorable William C. Beers, restraining her eviction on condition that she pay her rent into the escrow account kept by Legal Aid Service.

8. February 10, 1970—Order permitting Bonnie L. Colton to proceed in forma pauperis pursuant to 28 USC Section 1915.

9. February 16, 1970—Order granting Plaintiffs copies of transcripts of hearings of January 12 and January 20, 1970, at the expense of the United States.

10. March 11, 1970—Order joining as Defendants Donald Dale Timmons, Howard D. Steinbach and his wife, Marion Steinbach, and Stanley E. Hartman, individually and in their capacities as officers and/or agents of the Belmont East Corporation.

VIII.

EXPERT TESTIMONY

Plaintiffs

The testimony of Mrs. Josephone Brown, taken by deposition for use at trial on February 13, 1970 is offered as expert testimony concerning low-income housing, its availability and condition, and poverty all in general and as applied to the Lindseys and Snyder, in general and to show irreparable harm to Plaintiffs and for the identification of photographs marked Plaintiffs' Exhibits 25 through 44. A summary of her testimony is attached to this pre-trial order as Appendix "I".

Defendants

Defendant Dorothea M. Normet:

1. Testimony of Denton G. Burdick, Attorney at Law, to be taken by deposition on April 15, 1970, will be offered as expert testimony concerning practice and use of ORS 105.105, et seq.

2. Compilation and analysis of FED cases filed in Multnomah County for the years 1968 and 1969 is being made and will be submitted on stipulation between counsel for Plaintiffs and counsel for Defendants.

X.

The foregoing constitutes the Pre-Trial Order in the above cause; the pleadings pass out of the case and are superseded by this Order, which shall not be amended except by consent of the parties, or by Order of the Court, to prevent manifest injustice.

DATED this 18th day of April, 1970.

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
District Judge

The foregoing Pre-Trial Order is approved.

Attorneys for Plaintiffs:

By: /s/ John H. Clough — April 23, 1970
JOHN H. CLOUGH, Esquire — Date
Director, Trial & Appellate Div.

/s/ Kenneth J. Keller — April 23, 1970
KENNETH J. KELLER, Esquire — Date

/s/ Joseph C. Morehead — April 23, 1970
JOSEPH C. MOREHEAD, Esquire — Date

/s/ Keith E. Tichenor, — April 23, 1970
KEITH E. TICHENOR, Esquire — Date

/s/ Charles J. Merten — April 23, 1970
CHARLES J. MERTEN, Esquire — Date
Director, Legal Aid Service

Attorneys for the
Defendant Normet:

By: /s/ Theodore B. Jensen — 6-17-70
THEODORE JENSEN, Esquire — Date
Attorney for Dorothea M. Normet

/s/ Thomas Lekas — 6-17-70
THOMAS LEKAS, Esquire — Date
Attorney for Dorothea M. Normet

/s/ William A. Martin — 6-17-70
WILLIAM A. MARTIN — Date
Attorney for Dorothea M. Normet

APPENDIX I

Summary of Deposition of MRS. JOSEPHINE BROWN Expert Witness for Plaintiffs

Background and Qualifications: Mrs. Josephine Brown is married to P. Clair Brown and resides with her husband and three sons, ages 14, 20 and 22, at 4126 S.E. Oak Street, Portland, Oregon. She has resided in Portland since 1928. She is a graduate of Oregon State University with a BS degree in Home Economics.

Mrs. Brown is a member of Mt. Tabor Presbyterian Church, Portland Presbyterial Society, Church Women United in Portland, Glencoe and Washington High School PTA, East CAP Housing and Planning Commission, East Central Church Non-Profit Housing Corporation, Interfaith Housing Committee, Metropolitan Housing Inc., League of Women Voters, Inc., Greater Portland Council of Churches Social Concerns Committee, and Oregon Older Girls Advisory Board. She is also chairman of East CAP's Housing and Planning Commission.

In 1970, Mrs. Brown was named by the Oregon Journal as one of the Ten Women of Accomplishment in 1969 in the category of Community Housing. See Plaintiffs' Deposition Exhibits "U" and "V" which were offered to show her reputation and standing in the community as an expert on Housing in Portland.

Mrs. Brown has entered and inspected close to 200 homes in Portland of the low income bracket within the last four years.

Description of East CAP Housing Project: A group of churches in the east-central area of Portland started East CAP as a Community Action Program. Its initial function was to listen to the needs of the poor community and develop community service programs for the residents in east-central Portland. They found housing to be a high priority problem. In 1966 they formed a housing commission. Mrs. Brown joined this Commission in the Spring of 1966. For the first year, the Commission met weekly and simply studied and researched the problem of housing and sought out possible remedies. It built up a substantial library of materials on housing

problems and analyzed the subject from a national and a local viewpoint. Then, two years ago they formed a non-profit housing corporation to buy sub-standard housing, rehabilitate them and sell them to low income families. Mrs. Brown has consequently been in those homes which were rehabilitated and resold as well as in those too deteriorated to be repaired.

Mrs. Brown has read as many books on low income housing as she can. She has been involved in low income housing problems in Portland for four years. She has spoken to over two dozen groups on the subject in the last six months, accompanied by a slide presentation on housing in Portland. She has also been on a panel with Representative Roger Martin of the State Legislature, and Fred VanNatta, President of the Portland Home Builders Association, where they discussed the problems of low income housing in Portland. She has also spoken with people in the housing business in Portland such as members of the Portland Realty Board, from whom she obtained statistics and opinions on housing problems in Portland. She has compiled an extensive file of statistics herself. Her office is in her home and her work is strictly volunteer. She is not an employee of Legal Aid Service or any other delegate agency under the Office of Economic Opportunity.

Mrs. Brown inspected the Snyder and Lindsey homes at the request of Legal Aid Service. She was also present when the photographs identified as Plaintiffs' Exhibits 25 through 44 were taken. The description of these photographs as contained in the Pretrial Order is condensed from her Deposition and is incorporated by reference in this summary as if fully set forth herein.

Substance of Testimony: Housing for low income families is substandard housing. Low income families are those which are usually defined as four members with an income from zero to about $4,500. per year. She has been in close to 200 or more houses in the last four years, mostly houses provided for low income families. Conditions of these houses are generally very poor and some of them are deplorable. Most have poor wiring, plumbing, roofing, heating, and need paint. They may also have one or more dangerous conditions.

Mrs. Brown has talked with many low-income people who have been evicted or who are threatened with eviction. She finds that evictions cause financial harm in that it adds additional moving costs which require skimping on food bills and this, in turn, often causes injury to health. It is also an emotional trauma for the people involved. They lose their feeling of ability to cope with society and they lose their sense of standing and prestige in the community and in the eyes of their children. The children acquire stigma from their fellow school mates, who often know that they leave because they can't pay their bills. The total result is low-income families very often must put up with sub-standard housing. The witness knows personally of one family of ten who had to split up with half the family living in one dwelling and half the family living in another.

The witness states that based on her housing commission studies, 75% of low-income families in Portland rent their homes. She visited and talked with the Lindseys and Snyder at Legal Aid's request. Lindsey told her that they had looked for another place for two years, but the vacancy rate is so loaded that they can't find anything.

The vacancy rate figures that the witness uses are based upon figures from the research department of Portland General Electric Company. She has seen these twice in the last two years. They show that there is a 2% vacancy rate in Portland for rental units. However, she estimates that only 1% of the rental units in Portland are cheap enough for low-income families to afford. She also states that low-income families often pay higher housing costs than middle-income families, due to high utility costs caused by poor heating, wiring, and plumbing. Of course, they also pay a higher percentage of their income for housing.

Low-income people usually are unable to rent middle income housing first because the landlord refuses to show it to them. The witness claims that there is generally something about the low-income families which causes the landlord to refuse to show them his available housing. Also, they can't get middle-income housing because

they can't pay the required one or two months advance rent.

The witness affirms that the Lindsey and Snyder residences are comparable to other low-income housing she has seen. It is low-income housing because of the income of the families involved. The Lindseys' residence is one of the worst she has seen for low-income families, which people are still living in. Assuming that the rent the Lindseys pay is $100 per month, the witness states that this is high for rental units available to most low-income families.

Based upon her experience in housing problems, the witness definitely thinks that eviction would cause the Lindseys irreparable harm. Eviction would be an additional blow, adding to their multiple problems and this would be true of all low-income families and not just the Lindseys.

It is a continuing downward and tightening spiral, which they would find an emotional and ego block to overcome. They give up hope. If they have health problems they now have more medical costs. They lose jobs and their children can't go to school. They get behind and this creates emotional problems and they give up hope. Any additional financial costs could break them. Then they can't afford to move. This is true not only of people such as the Lindseys, but of all low-income families.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Caption Omitted]

Portland, Oregon
9:30 a.m.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS—
June 18, 1970

BEFORE:

The Honorable John F. Kilkenny, Judge of the United States Court of Appeals, 9th Circuit; The Honorable Gus J. Solomon, Judge of the United States District Court; and The Honorable Alfred T. Goodwin, Judge of the United States District Court, presiding.

APPEARANCES:

Messrs. John H. Clough, Kenneth J. Keller, Keith E. Tichenor and Joseph C. Morehead, Attorneys for Plantiff;

Messrs. Theodore B. Jensen, William A. Martin and Thomas J. Lekas, Attorneys for Defendants.

* * * *

[fol. 40] MR. JENSEN: Mr. Lekas wished to say something with regard to the relationship of Mrs. Normet and the plaintiff, what has been referred to as the landlord-tenant relationship. Plaintiffs did not, within the time permitted, say anything on that, but we would like to.

JUDGE GOODWIN: I think I made a finding of fact at the pretrial conference that it is the law of the case, as far as we are concerned now, that there was landlord-tenant relationship at the time this action was filed and I will hear you on it if you have something on the question of law, but I don't want to hear anything arguing about the facts.

* * * *

[Reporter's Certificate Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, MARIE DUNNE, BONNIE L. COLTON, and all other persons similarly situated, PLAINTIFFS

vs.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, DEFENDANTS

OPINION—September 10, 1970

Before: KILKENNY, Circuit Judge, and SOLOMON and GOODWIN, District Judges.

GOODWIN, District Judge:

This class action was brought to enjoin the enforcement in state courts of Oregon's Forcible Entry and Wrongful Detainer Law (ORS 105.105 to 105.160). Because plaintiffs assert unconstitutionality and demand an injunction, a three-judge court was convened under 28 U.S.C. § 2281.

The plaintiffs are tenants who, because of their poverty, are unable to obtain housing except in rental units that for various reasons are not satisfactory to them. After protesting the condition of their housing, some of the plaintiffs began to withhold the payment of rent. When the landlords commenced statutory proceedings to collect the rent or to evict the tenants, the plaintiffs sued to enjoin the evictions and to have the state laws declared unconstitutional.

All material facts are stipulated. For the purposes of testing the constitutionality of ORS 105.105 et seq., it is not necessary to decide whether the tenants' grievances are well founded. We will assume that one or more may be. It is agreed that the plaintiffs have protested and have not paid to their landlords the rent required under the terms of their rental agreements. During the pendency of this action, the rent has been paid into escrow pursuant to a conditional order restraining evictions.

It is conceded that Oregon law makes no provision for the withholding of rent as a means by which an aggrieved tenant may bring economic pressure to encourage a landlord to perform his obligations under the rental agreement. The state Legislative Assembly could institutionalize "rent strikes" if it desired to do so, but it has not enacted such legislation. See *Rent Withholding and the Improvement of Substandard Housing*, 53 Calif. L. Rev. 304 (1965). The plaintiffs argue that, in the absence of remedial legislation, this court should create a comparable remedy.

A threshold inquiry concerns abstention. Unless this is a proper case for the intervention of a federal court, this court ought to stay its hand.

We have examined rent-law decisions from other three-judge courts in which abstention was practiced, and we have examined the authorities cited on both sides of the question in this case. We have concluded that we should not abstain.

The challenged statute is clear. It is unlikely that an application of state law would change the posture of the federal constitutional issues. No state administrative process is involved. The case has been thoroughly briefed and argued on the merits, and is presented on a clear and complete record. It is ripe for decision. Only one appeal (to the United States Supreme Court) will now be needed to settle the federal constitutional question. While the state courts are also capable of applying the United States Constitution to a challenged state law, two levels of appeal would be needed in an F.E.D. case within the state system. A final state-court decision would still not necessarily settle the federal constitutional question.

Closely related to the time element is economy. Cases of this sort tax both courts and counsel. Until finally resolved, these cases produce expense, uncertainty, and frustration. Delay produces no balancing benefit, either of comity or of clarity in state-federal relations. We are advised that similar cases are now pending or ready for filing in the courts of Oregon. The interests of justice will best be served by rendering a decision on the merits without further delay.

The plaintiffs attack ORS 105.105 to 105.160 on eight due-process and equal-protection grounds.

The thrust of the plaintiffs' combined attacks on the statutory scheme is that the loss of possession during litigation is basically unfair to the poor, because, as a practical matter, loss of possession makes illusory any legal redress for the evils of substandard housing.

The landlords argue that the judicial creation of a means for retention of possession *pendente lite* would put a tenant, once in possession, in a practical position to hold someone else's property rent-free while he argues in court about real or imaginary faults in the housing.

The question for decision is whether the competing policy choices involved in resolving this political-economic problem ought to be made in a legislative environment or in a court case between two sets of litigants.

A century ago the Oregon Legislative Assembly, presumably representing the people of the state, elected to place the possession of property in the hands of the property owner during litigation. It is not for this court to decide whether that choice was either wise or socially desirable. Our function is to decide whether that choice, in light of present federal constitutional standards, offends the Constitution of the United States.

If the Oregon statutory scheme is out of step with the supreme law of the land, then this court must strike down the statute. If not, the people of Oregon remain free to enforce existing law or to debate and enact any other constitutional housing legislation that commends itself to them.

Plaintiffs first assert that F.E.D. pleadings under ORS 105.125(3) and (4) do not satisfy the fundamental

notice requirements of due process as guaranteed by the Fourteenth Amendment to the United States Constitution. A companion assault on the pleading statute asserts that it denies F.E.D. defendants equal protection of the laws, because defendants are in greater need of information than are plaintiffs. Both contentions must fail unless the notice requirements are clearly unreasonable.

The pleadings required by the challenged statute are at least as informative as those required by the Federal Rules of Civil Procedure. While the state has not institutionalized the discovery procedures available under the Federal Rules, we do not find the notice requirements of ORS 105.125 to be unreasonably sparse in view of the nature of the typical F.E.D. case.

The adequacy of notice ought to be related functionally to the facts of the ordinary case. While there may be exceptional cases, the usual F.E.D. case is one in which the tenant, like a taxpayer, knows whether or not he has paid, how much he has paid, and, if he has not paid, why he does not think he should pay. Detailed notice in such cases tends to elevate form over substance. We hold that the notice requirements of the Oregon statute serve the purposes of procedural fairness.

The second ground of attack asserts that ORS 105.135 offends due process in providing an unreasonably short time in which a tenant must appear in court. We hold that the Legislative Assembly acted within its constitutional powers in requiring that F.E.D. cases be heard within four days, in light of the purposes of the statute and the practical considerations known to the Assembly when the statute was adopted. As noted above, a tenant knows in most cases whether or not he has paid his rent, and, if not, why not. The tenant would not be any the wiser if the law were to be rewritten to give him ten days' notice. We find nothing unconstitutional in the statutory time element.

A third attack asserts that ORS 105.140 violates due process because it requires tenants to post cash security for their rent as a condition prior to obtaining a continuance for a comprehensive defense to the F.E.D. ac-

tion. The tenants, being poor, say that upon occasion this condition might be impossible to satisfy and that it therefore discriminates against the poor. It is, however, not unreasonable to require that a person whose eviction is sought for nonpayment of rent post security for the rent if he wishes to litigate the duty to pay. The landowner may also need money. There is no constitutional requirement that the owner allow a tenant to remain upon his land while he disputes in court the terms of the rental agreement. The challenged law does not deny the tenant access to the courts if he wishes to sue for a breach of contract or for other damages to which he might be entitled in an action at law. The F.E.D. statutes merely deny the tenant the power to hold the property while he engages in such litigation.

The plaintiffs contend that not all eviction cases arise out of nonpayment of rent, and argue that a month-to-month tenant ought to have protection against arbitrary eviction. Tenants who desire protection against arbitrary eviction may obtain it by entering into written leases. ORS 93.010, 93.020. Again, we know of no constitutional requirement that a landowner, whose tenant has not chosen to enter into a lease, must allow the tenant to remain on his land while suing the landowner for such transgressions as noncompliance with housing codes. While it may be competent for the legislature to make such a provision a part of the law of landlord and tenant, no constitutional requirement demands it.

A fourth ground of attack asserts that ORS 105.145 and 105.150 offend both due process and equal protection of the laws because these sections deny a tenant the opportunity to raise in an F.E.D. proceeding defenses he might raise in law or equity in nonpossessory proceedings. At issue here is not the right to litigate substantive disputes in a court of law, but, again, the policy question of the right to possession of property while disputes related to the property work their way through the courts. The Oregon legislature has made the choice in favor of the owner as against a nonpaying tenant. We do not believe this choice is so clearly unreasonable as to render the statute unconstitutional. The law must put

someone in possession of property while legal disputes are resolved, and it is at least as reasonable to place an owner in possession of his land as it would be to place an avowedly hostile tenant in possession under circumstances that would leave the owner wholly unsecured in the event he should prevail in court.

The appeal provisions of the F.E.D. law (ORS 105.160) are challenged as unreasonably denying judicial review in violation of due process of law. This challenge presents perhaps the most difficult question in this case. The Oregon Supreme Court recently passed upon the same question, holding that the statute was not unconstitutional. *Scales* v. *Spencer*, 246 Or. 111, 424 P.2d 242 (1967). The statute provides that if a tenant ousted of possession in an F.E.D. proceeding desires to appeal to the Circuit Court he must post a bond for double the amount of rent that will accrue pending the appeal. To the contention that this statute singles out for discriminatory treatment the tenant of rental housing, the state court answered that, without a provision for some reasonable measure of liquidated damages (the doubled rent pending appeal), every ousted tenant would appeal, secure in the knowledge that he had nothing to lose thereby as rent would be payable in any event. We agree with the state court that the legislature had a rational basis for placing this type of appeal in a different category from other appeals in the state judicial system. The classification is not so unreasonable as to constitute a violation of the Fourteenth Amendment.

The remaining challenges of the statute are essentially similar to those discussed. Each picks out a section of the statutory scheme and asserts that it unconstitutionally discriminates against the poor because a rich person could remain in possession of the property and litigate with the landlord on more equal strategic footing than could a poor person after he has been dispossessed.

In fairness to the plaintiffs and their able counsel who presented this case, it must be acknowledged that the plaintiffs make a strong argument that the statute, as a whole, is more oppressive to the poor than a section-

by-section analysis of its parts will demonstrate. This may be true, but, even so, the point does not establish unconstitutionality.

Many laws dealing with essentially economic matters may be oppressive to the poor. Poverty itself is so oppressive that legislative bodies spend a vast amount of their time and energy attempting to alleviate its burdens.

One currently active subject for legislative reform, for example, is the problem of enforcing city building and housing codes for the benefit of the poor. Without legislation, the poor cannot enforce such codes by the direct and practical device of the rent strike. The plaintiffs have not put forward, however, a valid reason for the judiciary rather than the legislative branch of government to make whatever changes may be socially desirable.

For the reasons stated, we fail to perceive a violation of the United States Constitution in Oregon's statutory scheme for the eviction of nonpaying tenants. The political and economic questions presented by these plaintiffs are all questions that can be resolved by the processes of representative government. Such questions do not demand judicial solution at this time.

The defendants shall have judgment for their costs and disbursements. The Temporary Restraining Order is vacated and the escrow is ordered to distribute all rentals to the appropriate persons and close the escrow.

DATED this 10th day of September, 1970.

/s/ John F. Kilkenny
United States Circuit Judge

/s/ Gus J. Solomon
United States District Judge

/s/ Alfred T. Goodwin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civ. No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, MARIE DUNNE, BONNIE L. COLTON, and all other persons similarly situated, PLAINTIFFS

vs.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, DEFENDANTS

JUDGMENT—Filed September 10, 1970

Before: KILKENNY, Circuit Judge, and SOLOMON and GOODWIN, District Judges.

Pursuant to the opinion by this Court rendered herein on this date, IT IS ORDERED AND ADJUDGED that the action herein be, and the same is hereby, dismissed.

DATED this 10th day of September, 1970.

/s/ John F. Kilkenny
Circuit Judge

/s/ Gus J. Solomon
District Judge

/s/ Alfred T. Goodwin
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 70-8

[File Endorsement Omitted]

DONALD LINDSEY, EDNA LINDSEY, EVARET SNYDER, KEITH L. OETTING, RANDALL LOWE, MARJORIE LOWE, PRINCESS THOMAS, MARIE DUNNE, BONNIE L. COLTON, and all other persons similarly situated, PLAINTIFFS

vs.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, DEFENDANTS

NOTICE OF APPEAL—Filed September 14, 1970

Notice is hereby given that DONALD LINDSEY and EDNA LINDSEY and all other persons similarly situated, Plaintiffs above named, hereby appeal to the United States Supreme Court from the final opinion and judgment made and entered herein on September 10, 1970, which dismissed the within action and which granted judgment in favor of the Defendants for costs and disbursements and vacated the temporary restraining order and ordered distribution of all rentals.

Plaintiffs also appeal from the Order of the Honorable Alfred T. Goodwin of January 12, 1970, dismissing Defendants CLIFFORD N. CHRISTANSEN, individually and in his capacity as Director of the Bureau of Buildings of the City of Portland, Oregon, and CLARENCE C. CRANK, individually and in his capacity as Director of Building Inspections of the City of Portland, Oregon.

This appeal is taken pursuant to 28 U.S.C. § 1253.

LEGAL AID SERVICE

By: /s/ John H. Clough
JOHN H. CLOUGH, Esquire
Director,
Trial & Appellate Div.
Attorney for Plaintiffs

[Proof of Service (Omitted in Printing)]

SUPREME COURT OF THE UNITED STATES

No. 6158, October Term, 1970

DONALD LINDSEY, ET AL., APPELLANTS

vs.

DOROTHEA M. NORMET, ET AL.

ON CONSIDERATION of the motion of appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be and the same is hereby, granted.

May 3, 1971

SUPREME COURT OF THE UNITED STATES

No. 6158, October Term, 1970

DONALD LINDSEY, ET AL., APPELLANTS

v.

DOROTHEA M. NORMET, ET AL.

APPEAL from the United States District Court for the District of Oregon.

The statement of jurisdiction in this case having been submitted and considered by this Court, probable jurisdiction is noted.

May 3, 1971

Mr. Justice Black agrees that probable jurisdiction should be noted for the reasons set forth in opinion in No. 5048.

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Supreme Court, U.S.
FILED
DEC 28 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 6138 70-5045

DONALD and EDNA LINDSEY et al,

Appellants,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah, C. N. CHRISTIANSEN, individually and in his capacity as Director of the Bureau of Buildings of the City of Portland, Oregon, and C. C. CRANK, individually and in his capacity as Director of Building Inspections of the City of Portland, Oregon,

Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION OF APPELLEE NORMET TO DISMISS OR IN THE ALTERNATIVE AFFIRM

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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No. 6158

DONALD and EDNA LINDSEY et al,

Appellants,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah, C. N. CHRISTIANSEN, individually and in his capacity as Director of the Bureau of Buildings of the City of Portland, Oregon, and C. C. CRANK, individually and in his capacity as Director of Building Inspections of the City of Portland, Oregon,

Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION OF APPELLEE NORMET TO DISMISS OR IN THE ALTERNATIVE AFFIRM

Appellee Dorothea M. Normet, hereinafter called "Appellee," moves this Court to dismiss this appeal on the ground that this Court does not have jurisdiction of this appeal. In the alternative appellee moves this Court to affirm the judgment of the District Court

below on the ground that the questions presented are so unsubstantial as not to warrant oral argument and further consideration by this Court.

STATUTES INVOLVED

The statutes involved are the Forcible Entry and Wrongful Detainer statutes of the State of Oregon, Or. Rev. Stat. §§ 105.105-.160 which are set forth verbatim as Appendix "A" to this motion.

QUESTIONS PRESENTED

Motion to Dismiss

Has this Court jurisdiction of the appeal where appellants did not serve their notice of appeal upon all of the parties to the proceedings in the Court where the judgment appealed from was issued?

Motion to Affirm

1. Is this appeal so unusually important that this Court should consider appellants' contention raised here for the first time, that Or. Rev. Stat. §§ 105.105-.160 violate the Ninth and Tenth Amendments to the U. S. Constitution, and, if so, do the statutes violate the Ninth and Tenth Amendments?

2. By providing landlords with the remedy set forth in Or. Rev. Stat. §§ 105.105-.160, has the State of Oregon created an unreasonable distinction and

classification which violates the Equal Protection clause of the Fourteenth Amendment to the U. S. Constitution?

3. Are the minimum allegations required by Or. Rev. Stat. § 105.125(3) and (4) so unreasonably vague and is the time period prescribed by Or. Rev. Stat. §§ 105.135 and .140 so unreasonably short that appellants are deprived of the adequate notice and opportunity to defend guaranteed by the Due Process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution?

4. Does Or. Rev. Stat. § 105.160 by requiring on appeal an undertaking of twice the rental value of the real property deprive appellants of the Due Process guaranteed by the Fifth and Fourteenth Amendments to the U. S. Constitution?

STATEMENT OF THE CASE

All the facts of the case were agreed to and set forth in the Pretrial Order (R. 150-153). The agreed facts are as follows:

Appellee's father was the legal owner of a single family residence, and sold the residence to Bernice Reed under a contract sale, retaining legal title only to secure purchaser's performance of the contract. Upon the death of appellee's father, appellee became the owner of the seller's interest in the contract and holder of the legal title to the residence to secure purchaser's performance of the contract. Bernice Reed

had assigned her contract purchaser's interest to Jim Hines, who rented the residence to appellants. Appellants are month to month tenants, and their tenancy can be terminated by either party by 30 days prior written notice to the other party.[1] Appellants paid in advance $100.00 per month as rent for the residence.

Hines failed to make a number of the payments due appellee under the contract of sale, and appellee thereafter collected the rent payments from the appellants, and credited the amounts received on the unpaid balance owing from Hines under the contract sale. Even after crediting such amounts, Hines was in default under the contract.

As a result of a complaint made in behalf of the appellants, the Bureau of Buildings of the City of Portland, Oregon, inspected the residence and declared that certain conditions existing in the residence violated the Housing Code of the City of Portland. The Bureau ordered the owner and occupants to vacate the residence within 30 days, or show cause why the residence should not be vacated. Appellants requested appellee to make the required repairs, and appellee made certain repairs. However, appellee did not make any repairs requiring substantial expenditures due to the condition of the title to the residence. Appellants did not vacate the residence as directed by the Bureau of Buildings, and thereafter refused to pay the rent as it became due.

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[1] See Or. Rev. Stat. § 91.070.

Appellee advised appellants that they must vacate the residence in compliance with the order of the Bureau of Buildings of the City of Portland. Appellants did not vacate the residence, contended that they were threatened with eviction, and filed this case in the U. S. District Court for the District of Oregon seeking a declaration that Or. Rev. Stat. §§ 105.105-.160 are unconstitutional, and an order enjoining appellee, the Judges of the District Court of the State of Oregon for the County of Multnomah, C. N. Christiansen, the Director of the Bureau of Buildings and C. C. Crank, the Director of Building Inspections of the City of Portland, Oregon, from evicting appellants from the residence. Appellee has not filed against appellants any eviction action under Or. Rev. Stat. §§ 105.105-.160. However, the appellee filed a suit to foreclose the contract of sale and, in addition to naming as a defendant the contract purchaser Hines, named as defendant the appellants by reason of their possession of the residence as month to month tenants.

The State of Oregon has not as yet enacted a statute allowing a tenant to withhold the payment of rent as a means of compelling a landlord to perform repairs to rented premises.

A three judge district court was convened under 28 U.S.C. § 2281. The case was submitted to the Court upon a stipulation of all material facts and upon the issues set forth in the Pretrial Order. The Court issued its opinion and judgment declaring that Oregon's eviction statutes, Or. Rev. Stat. § 105.105-

.160, are constitutional, vacating the temporary restraining order issued during the pendency of the case, and dismissing the action. Appellants filed a Notice of Appeal to this Court from the above opinion and judgment and from an intermediate order of the Court dismissing the case as to C. N. Christiansen, individually and in his capacity as Director of the Bureau of Buildings of the City of Portland, Oregon, and C. C. Crank, individually and in his capacity as Director of Building Inspections of the City of Portland, Oregon.

ARGUMENT ON MOTION TO DISMISS

This appeal should be dismissed because it was not taken in conformity with Rules 10 and 11, and is therefore not within the jurisdiction of this Court. Rule 10, part 2 requires that the notice of appeal be served on all parties to the proceeding in the court where the judgment appealed from was issued, and that proof of such service be filed with the notice of appeal. Rule 11 requires the filing of the notice of appeal prescribed by Rule 10.

The Honorable William C. Beers, Judge of the District Court of the State of Oregon, for the County of Multnomah, C. N. Christiansen, individually and in his capacity as Director of the Bureau of Buildings of the City of Portland, Oregon, and C. C. Crank, individually and in his capacity as Director of Building Inspection of the City of Portland, Oregon, were each parties to the proceeding in the court where the

judgment appealed from was issued. Appellants have not served their notice of appeal upon any of the above parties nor filed proof of such service.

All three of the parties are necessary to this appeal. Appellants are seeking an injunction against the Honorable William C. Beers, and other judges similarly situated, prohibiting them from entering any judgment of restitution or any order of execution against the appellants. Appellants also seek an injunction enjoining C. N. Christiansen and C. C. Crank from evicting them for the reason that the residence violates certain provisions of the Housing Code of the City of Portland. In their notice of appeal, appellants appealed from the order of the District Court dismissing these two defendants.

Rule 10, part 4 provides an alternate procedure where the appellant feels that certain of the parties in the proceeding in the court where the judgment appealed from was issued have no interest in the outcome of the appeal. The procedure outlined provides for notice to such uninterested parties so that they may participate in the appeal if they wish to do so. Appellants apparently have not complied with this requirement either.

Compliance with Rules 10 and 11 should be jurisdictional, and failure to comply therewith should result in a dismissal of the appeal.[2]

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[2] See *Taggart* v. *New York*, 392 U.S. 667 (1968); *Wilson* v. *Kiesel*, 164 U.S. 248 (1896).

ARGUMENT ON MOTION TO AFFIRM

The final judgment of the District Court below should be affirmed on the ground that the questions presented are so unsubstantial as not to warrant oral argument and further consideration by this Court.

1. Or. Rev. Stat. Sections 105.105-.160 do not violate the Ninth and Tenth Amendments.

For the first time in this case, appellants assert that Oregon's eviction statutes violate the Ninth and Tenth Amendments to the U. S. Constitution. Appellants cannot, in this appeal, assert that the Oregon eviction statutes violate the Ninth and Tenth Amendments when they did not raise such contended violations in the proceeding below. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), cited by appellants does not apply here. In the *Schwinn* case this Court noted that changes in theory asserted for the first time on appeal to this Court are not regarded favorably, and are rejected except in cases of unusual importance.[3] This case is clearly not of such unusual importance.

Appellants apparently contend that Oregon's eviction statutes violate the Ninth and Tenth Amendments because a tenant is not permitted to raise any defenses in an eviction action. Appellants' premise is incorrect and is not supported by any evidence. The Oregon Courts do permit a tenant to raise relevant

[3] 388 U.S. at 371.

defenses, and the defenses are not limited to the title questions.[4] In an eviction action, where the defense is not one that can be heard by a district court, the court will transfer the case to the circuit court.[5]

Since appellee has not commenced an eviction action against appellants, there is no evidence as to which of appellants' defenses would be permitted by the Oregon courts. To assume that the Oregon courts would hold that appellants' defenses are or are not relevant defenses is mere speculation.

Oregon has not as yet enacted a statute permitting tenants to withhold payment of rent to compel landlords to repair housing code violations existing in rented dwellings, nor have the Oregon courts imposed upon landlords an implied warranty of habitability. The Oregon courts might therefore hold that the fact that the rented premises violates a housing code is not relevant in an eviction action. Even so, the U. S. Constitution does not require that a state must

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[4] See *Friedenthal* v. *Thompson*, 146 Or. 640, 31 P.2d 643 (1934) (reformation of written lease); *Share* v. *Williams*, 204 Or. 664, 277 P.2d 775, 285 P.2d 523 (1955) (defendants asserted rights under agreement cancelling contract of sale of property from plaintiff); *Leathers* v. *Peterson*, 195 Or. 62, 244 P.2d 619 (1952) (deed of property from defendant to plaintiff was intended as a mortgage and defendant was the owner of the property); *Priester* v. *Thrall*, 229 Or. 184, 349 P.2d 866, 365 P.2d 1050 (1961) (plaintiffs held legal title to real property as trustees for defendants who held an equitable interest in the property). See also *Wright* v. *Bauman*, 259 Or. 410, 413-5, 398 P.2d 119 (1965) (leases and rental agreements interpreted contractual agreements with dependent obligations).

[5] *Priester* v. *Thrall*, 229 Or. 184, 190, 349 P.2d 866, 365 P.2d 1050 (1961).

by legislative or judicial action allow tenants to raise housing code violations as defenses in eviction actions. *Javins* v. *First National Realty Corp.*, 39 U.S. L. Week 3224 (U.S. Nov. 23, 1970) and other cases cited by appellants do not establish such a constitutional requirement. The *Javins* case is also distinguishable from this case since the tenants held the property under a written lease. Appellants here occupy appellee's residence under a month to month tenancy. A month to month tenancy may be terminated by either party upon 30 days' prior written notice to the other party.[6] Where a landlord and tenant have not entered into a lease and have created only a month to month tenancy, there is no constitutional requirement that the tenant must be permitted to remain in possession of the property while suing the landlord for failure to comply with housing codes, without posting security for the payment of rent accruing during the pendency of the action.

To the contrary, the Tenth Amendment reserves to the states powers which the Constitution does not delegate to the United States nor prohibit to the states. The right to legislate regarding the right to possession of real property and the form of legal proceedings in connection therewith is clearly within the scope of the powers reserved to the states by the Tenth Amendment. The State of Oregon has by legislative action declared that a landlord is entitled to possession of his real property during the pendency of disputes arising

[6] See Or. Rev. Stat. § 91.070.

between him and his tenant, unless the tenant posts with the court security for the payment of the rent accruing during the pendency of the action.

Appellants also base their contention upon the incorrect premise that the City of Portland does not enforce its Housing Code. There is no evidence in this case that the City of Portland does not enforce its Housing Code. The code authorizes the Director of Building Inspections to determine violations of the code, and order that the conditions be corrected to comply with the code or the residence vacated. The Director is also authorized to enforce the penal provisions of the code, and order the residence condemned and demolished.[7] The evidence in this case is that the Building Inspection Department of the City of Portland inspected the residence occupied by appellants, found that the residence violated the Housing Code, and ordered the violations corrected or the residence vacated within 30 days. Since the violations were not corrected, appellants would have been required to vacate the residence had they not filed this suit and joined as defendants the Directors of the Bureau of Buildings and Building Inspections of the City of Portland, Oregon, the departments responsible for the enforcement of the Housing Code. It does not follow that just because the Oregon courts might not allow a tenant to raise violations of the Housing Code as a defense in an action to evict the tenant, the City

[7] Code of the City of Portland, §§ 14.04.010, 14.08.010, 29.04.010-.090, and 29.28.010, appended hereto as appendix "B," (Appendix page 27).

of Portland does not provide meaningful enforcement of the Code.

The enforcement of Portland's Housing Code is meaningful since a landlord will generally repair code violations rather than have the residence stand vacant or be subject to a fine and imprisonment. If it is not economical to make the required repairs, the city will require that the residence be demolished.

Retaliatory eviction is not involved in this case, and was not raised by the appellants in the proceeding below, nor considered by the court. Appellee has not attempted to evict appellants from her residence because appellants requested that the Bureau of Buildings of the City of Portland inspect the residence for violations of the Housing Code. Rather, appellee was seeking to foreclose her contract of sale of the residence to Hines due to defaults in the payments due thereunder. Appellants were named defendants in the foreclosure suit because they were in possession of the residence as month to month tenants.

2. Or. Rev. Stat. Sections 105.105-.160 do not violate the Equal Protection clause of the Fourteenth Amendment.

By providing the eviction procedure available to landlords under Or. Rev. Stat. §§ 105.105-.160, the State of Oregon has not created an unreasonable distinction and classification which violates the equal protection clause of the Fourteenth Amendment to the U. S. Constitution. Or. Rev. Stat. § 105.105 deprives the landlord of the right to forcibly retake possession

of real property rented or leased to a tenant, as a lessor of personal property may do. The landlord is required to obtain a legal determination of his right to possession. Or. Rev. Stat. §§ 105.110-.160 provide the landlord with a procedure to obtain a legal determination of his right to possession of real property without the delay of normal litigation, except where the tenant posts security for the payment of the rent accruing during the proceedings. Without the availability of such a procedure or such security requirements, the tenant could remain in the property rent free for a substantial period of time, and the landlord would have little chance to collect the unpaid rent, especially from an indigent tenant. Therefore, the statutory distinction is based upon reasonable grounds. In addition, the procedure is reasonable. The statute requires (1) that the landlord file a complaint in the district or circuit court of the county in which the property is located, (2) that the tenant be personally served with the complaint and a summons designating the time and place where the trial will be held, and (3) that a trial of the case be held before a judge or a jury at the request of either party. Also the tenant need not file a written answer to the complaint.

This Court has held that the Equal Protection clause of the Fourteenth Amendment does not prohibit different treatment of different groups so long as the classification of the group is not made on grounds which are wholly irrelevant to the objective of the legislation.[8] Since the landlord was deprived of

[8] *McGowan* v. *Maryland*, 366 U.S. 420, 425-6 (1961).

the right to retake possession of real property without a legal determination of his right to do so, it was necessary and reasonable that the landlord be provided with a quick procedure to obtain such a determination, or some assurance that he would be able to recover the rent accruing during the period of the proceedings, if the court determines that he is entitled thereto. Therefore, Or. Rev. Stat. §§ 105.105-.160 do not violate the Equal Protection clause of the Fourteenth Amendment.

3. Or. Rev. Stat. Sections 105.125, .135, and .140 do not violate the Due Process clauses of the Fifth and Fourteenth Amendments.

Or. Rev. Stat. § 105.125 sets forth the minimum allegations necessary to state a cause of action under Oregon's eviction statutes. The statute requires that a complaint set forth allegations describing the premises, stating that the tenant entered the premises with force or unlawfully holds the premises with force, and stating that the landlord is entitled to possession. The complaint must also contain a prayer for the relief requested.[9] The court in the proceeding below found that "[t]he pleadings required by the challenged statute are at least as informative as those required by the Federal Rules of Civil Procedure."[10]

The allegation required by Or. Rev. Stat. § 105.125 (3), that the tenant "unlawfully holds the premises

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[9] Or. Rev. Stat. § 16.210(2).

[10] Court's opinion page 4, Appendix to Appellants' Jurisdictional Statement page 4.

with force;" is not unreasonably vague and gives a tenant the adequate notice of the grounds for eviction guaranteed him by the Due Process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution. The term "unlawful holding by force" is defined by Or. Rev. Stat. § 105.115 as either failing to pay rent within 10 days after the date due, or remaining in the premises after expiration of a lease or after receipt of notice to vacate. It is common knowledge among tenants as well as landlords that either of the above conditions is a ground for eviction. Also, the tenant always has equal knowledge with the landlord of the relevant facts constituting the ground for eviction, that is, the tenant knows if he has not paid his rent, or if his lease has expired, or if he has been given statutory notice to vacate the premises.

The minimum allegations required by Or. Rev. Stat. § 105.125 adequately advise a tenant that his landlord is seeking to recover possession of the described property which the tenant possesses, and that the landlord bases his right to recover possession on either the tenant's failure to pay rent within 10 days after it is due or the termination of the tenancy by expiration of a lease or notice to vacate. Which of the two alternative grounds the landlord is asserting is within the knowledge of the tenant in every conceivable case.

Or. Rev. Stat. §§ 105.135 and .140 prescribe the period of time which must elapse, between the service of summons and the trial of the eviction action. Or.

Rev. Stat. § 105.135 provides for a two to four day period, and Or. Rev. Stat. § 105.140 provides for a continuance of the two to four day period for an additional two days without the posting of security, and for an unlimited continuance upon the condition that the tenant file an undertaking with security to effect that he will pay the landlord the rent accruing during the period of the requested continuance, if judgment is ultimately rendered against the tenant.

The statutes do not effectively limit the period to a maximum of six days, as appellants contend. A tenant can file a personal undertaking,[11] and deliver to the court as security, the rent which would accrue during the period of the continuance requested. The tenant must pay no more than he would have had to pay the landlord as rent had the eviction action not been filed, unless he requests a continuance for more than a month.

Appellants appear to concede that if the statute is interpreted and applied so as to require a tenant only to pay rent as it would otherwise fall due, the statute would not violate the Due Process clauses of the Fifth and Fourteenth Amendments. Appellants' contention that the statutes are interpreted and applied otherwise is incorrect and not supported by any evidence. Appellee has not filed an eviction action against appellants, nor have appellants requested an Oregon court to grant a continuance under Or. Rev. Stat. § 105.140. Since no court interpretations of the

[11] See Or. Rev. Stat. § 29.250.

statutes are available, the statutes must be interpreted so as to make them constitutional if possible.[12]

In addition, in determining the actual time which a tenant has to prepare a defense, the court must consider that prior to receipt of summons a tenant has at least an additional 10 days notice of eviction in the case of eviction for nonpayment of rent, or an additional 30 or more days notice in the case of termination of lease or notice to vacate. These periods are available to a tenant for the preparation of his defense. Where the tenant knows it is inevitable that his landlord will file an eviction action, and he knows why he has not paid his rent or is in possession after expiration of his lease or receipt of notice to vacate, the period of time is not so unreasonably short. The tenant is not deprived of sufficient time within which to adequately prepare his defense, and, therefore, the statutes do not violate the Due Process clauses of the Fifth and Fourteenth Amendments.

The Due Process clauses of the Fifth and Fourteenth Amendments require only that a party be given reasonable notice of the action filed against him and reasonable opportunity to appear and assert his defenses.[13] In determining whether the notice and opportunity to defend are reasonable, the court must consider the nature of the proceedings.[14]

In an eviction action the only question presented

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[12] *United States* v. *Harriss*, 347 U.S. 612, 618 (1953).
[13] See *Dohany* v. *Rogers*, 281 U.S. 362, 369 (1929).
[14] Id. at 369.

is whether the landlord is entitled to possession of the property. The only grounds which a landlord can assert are the tenant's failure to pay rent within 10 days after due, or the tenant's failure to vacate after the termination of lease or notice to vacate. The only defenses available are those relevant to the right to possession of the premises. The eviction action therefore presents very narrow factual issues and the proof is equally within the knowledge of and is equally available to the landlord and the tenant, and does not require any complex or difficult proof such as expert testimony, depositions, tests, studies, etc. In the light of these facts, the notice required by Or. Rev. Stat. § 105.125 is not so unreasonably vague as to deprive a tenant of reasonable notice of the claim against him, nor is the time period between service of summons and trial as prescribed by Or. Rev. Stat. §§ 105.135 and .140 so unreasonably short that a tenant is deprived of a reasonable opportunity to appear and present his defense thereto.

Appellants' reliance on *Sniadach* v. *Family Finance Corp.*[15] is misplaced. The Court there found that the mere withholding of a person's wages was a taking of property, and where the taking occurred without a hearing on the merits, the person was deprived of property without due process of law. The Oregon Eviction Statutes do not deprive a tenant of possession before a hearing on the merits of his right to remain in possession.

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[15] 395 U.S. 337 (1969).

4. Or. Rev. Stat. Section 105.160 does not violate the Due Process clause of the Fifth and Fourteenth Amendments.

Or. Rev. Stat. § 105.160 is not so unreasonable as to violate the Due Process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution. The statute requires as a condition for an appeal by a tenant that he file an undertaking to pay twice the rental value of the real property from the commencement of the case to the final judgment should the landlord prevail on the appeal. The statute does not require a corporate surety bond, a personal undertaking is sufficient.[16] Since a final judgment in an eviction action cannot include a judgment for rent or other damages, the requirement of such an undertaking is not so unreasonable as to violate the Due Process clauses of the Fifth and Fourteenth Amendments.[17] There is clearly a reasonable basis for placing this type of an appeal in a different category than other appeals in Oregon's judicial system.

This Court has noted probable jurisdiction in the case of *Sanks* v. *Georgia*, which is now pending.[18] While the Georgia eviction statutes which are being considered by the Court in that case are substantially different from Oregon's eviction statutes, both statutes require on an appeal by the tenant, an undertaking for twice the rental value of the property during the pendency of the appeal. The Court is apparently

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[16] See Or. Rev. Stat. § 29.250.
[17] *Scales* v. *Spencer*, 246 Or. 111, 424 P.2d 242 (1967).
[18] 395 U.S. 974 (1969).

considering the constitutionality of requiring such an undertaking, and consideration of the same question in this case is unnecessary.

CONCLUSION

Appellee respectfully submits that appellants' appeal be dismissed for failure to comply with the requirements of Rule 10 of this Court. In the alternative, appellee respectfully submits that the judgment of the District Court below should be affirmed on the ground that the questions presented are so unsubstantial as not to warrant oral argument and further consideration by this Court.

Respectfully submitted,

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Dorothea M. Normet

APPENDIX "A"

FORCIBLE ENTRY AND WRONGFUL DETAINER STATUTES OF THE STATE OF OREGON

105.105. Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force.

105.110. Action for forcible entry or wrongful detainer. When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.

105.115. Causes of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement under which he holds, or to deliver possession of the premises after being in default on payment of rent for 10 days.

(2) When the lease by its terms has expired and has not been renewed, or when the tenant or person

in possession is holding from month to month, or year to year, and remains in possession after notice to quit as provided in ORS 105.120, or is holding contrary to any condition or covenant of the lease or is holding possession without any written lease or agreement.

105.120. Notice necessary to maintain action in certain cases; waiver of notice; effect of advance payments of rent. (1) An action for the recovery of the possession of the premises may be maintained in cases provided in subsection (2) of ORS 105.115, when the notice to terminate the tenancy or to quit has been served upon the tenant or person in possession in the manner prescribed by ORS 91.110 and for the period prescribed by ORS 91.060 to 91.080 before the commencement of the action, unless the leasing or occupation is for the purpose of farming or agriculture, in which case such notice must be served for a period of 90 days before the commencement of the action.

(2) Any person entering into the possession of real estate under written lease as the tenant of another may, by the terms of his lease, waive the giving of any notice required by this section.

(3) The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against him for the possession of premises before the expiration of any period for which the tenant or person has paid the rent of the premises in advance.

105.125. Complaint. In an action pursuant to ORS 105.110 it is sufficient to state in the complaint:

(1) A description of the premises with convenient certainty;

(2) That the defendant is in possession of the premises;

(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

(4) That the plaintiff is entitled to the possession of the premises.

105.130. How action conducted. Except as provided in ORS 105.135 to 105.160, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

105.135. Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

105.140. Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

105.145. Judgment on trial by court. If the action is tried by the court without a jury, and after hearing the evidence it concludes that the complaint is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint

true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable.

105.150. Verdict and judgment on trial by jury. If the action is tried by a jury and they find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, they shall render a general verdict of not guilty; if true in part, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict.

105.155. Form of execution. The execution, should judgment of restitution be rendered, may be in the following form:

State of Oregon,)
) ss.
County of .....)

To the sheriff or any constable of the county:

Whereas, a certain action for the forcible entry and detention, (or the forcible detention) of the following described premises, to wit: .....,
lately tried before the above entitled court, wherein ..... was plaintiff and ..... was defendant, judgment was rendered on the .....day of .....
A.D., ..., that the plaintiff .....have restitution

of the premises, and also that he recover the costs and disbursements in the sum of $_____;

In the name of the State of Oregon, you are, therefore, hereby commanded to cause the defendant and his goods and chattels to be forthwith removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and chattels of the defendant, and make the costs and disbursements, aforesaid, and all accruing costs, and to make legal service and due return of this writ.

Witness my hand and official seal (if issued out of a court of record) this _____day of _____, A.D. _____.

_____

Justice of the peace, or clerk of the district or circuit court.

105.160. Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of

twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action.

APPPENDIX "B"

CODE OF THE CITY OF PORTLAND, OREGON

14.04.010. Offenses generally. The doing of any act or thing prohibited or the failing to do any act or thing commanded to be done in this code within the corporate limits of the city and within such other areas as may be specified in this code is hereby declared to be an offense against the public peace, safety, health, morals and general welfare of the people of the city.

14.08.010. Penalty for violation. Violation of any provision of this code is punishable, upon conviction, by a fine of not more than five hundred dollars, or by imprisonment not exceeding six months, or both. However, no greater penalty shall be imposed than the penalty prescribed by Oregon statute for the same act or omission.

29.04.010. Purpose. The purpose of this title is to provide minimum requirements for the protection of life, limb, health, property, safety and welfare of the general public and the owners and occupants of residential buildings.

29.04.020. Scope. (a) Application. The provisions of this title shall apply to all buildings or portions thereof, used, or designed, or intended to be used for human habitation. Such occupancies in existing buildings may be continued as provided in Section 24.02.100 subject to the provisions of this title prohibiting such occupancy.

Where any building or portion thereof is used or intended to be used as a combination apartment house-hotel, the provisions of this title shall apply to the separate portions as if they were separate buildings.

(b) Alteration. Existing buildings which are altered or enlarged shall be made to conform to this title insofar as the new work is concerned and in accordance with Sections 24.02.040-24.02.080.

(c) Relocation. Existing buildings which are moved or relocated shall be considered as new buildings and shall comply with all the requirements of this title.

29.04.030. Building inspections director to enforce title. The building inspections director is hereby authorized and directed to administer and enforce all the provisions of this title.

29.04.040. Right of entry. To the full extent permitted by law, upon presentation of proper credentials the building inspections director or his duly authorized representatives may enter at reasonable times any building, structure or premises in the city to perform any duty imposed upon him by this title.

29.04.050. Liability for maintenance. Every owner, or his agent, in addition to being responsible for maintaining his building in a sound structural condition, shall be responsible for keeping that part of the building or premises which he occupies or controls in a clean, sanitary and safe condition including the shared or public areas in a building containing

two or more dwelling units. Every owner shall, where required by this title, or other titles or ordinances of the city, furnish and maintain such approved sanitary facilities as required, and shall furnish and maintain approved devices, equipment or facilities for prevention of insect and rodent infestation, and where infestation has taken place, shall be responsible for the extermination of any insects, rodents or other pests when such extermination is not specifically made the responsibility of the occupant by law or ruling. Every occupant of a dwelling unit or efficiency living unit, in addition to being responsble for keeping in a clean, sanitary and safe condition that part of the dwelling or dwelling unit or premises which he occupies and controls, shall dispose of all his rubbish, garbage and other organic waste in a manner required by code or ordinances of the city.

Every occupant shall, where required by this title, or other codes or ordinances of the city, furnish and maintain approved devices, equipment or facilities necessary to keep his premises safe and sanitary.

29.04.060. Interpretation. Whenever any person, who has been notified of noncompliance with this title or who has been ordered by the building inspections director to make any correction, to perform any act or to incur any expense, desires to question the interpretation of this title by the building inspections director, such person may apply to the housing advisory and appeal board for an interpretation of this title, or its application to any specific case or situation by

filing a request therefor in writing with the building inspections director together with a five dollar fee. The board shall by written decision interpret the intent of any provisions of this title in its application. Such interpretation shall be followed in applying provisions of this title.

29.04.070. Continuance of other penal provisions. The provisions of this title shall not be deemed to be in lieu of any other penal provisions of this title or ordinances of the city, and if any act or condition is prohibited in this title and in ordinances of the city, the prohibition in this title or ordinances shall continue and the penalties prescribed therein shall apply upon conviction of a violation of such other provision.

29.04.080. Reference to other titles. (a) The building regulations, which are referred to in various parts of this title, shall be the building regulations, Title 24.

(b) The planning and zoning regulations, which are referred to in various parts of this title shall be the planning and zoning regulations, Title 33.

29.04.090. Violations. It is unlawful for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy or maintain any building or structure in the city, or cause or permit the same to be done, contrary to or in violation of any of the provisions of this title.

29.28.010. Substandard buildings. (a) Any build-

ing or portion thereof including any dwelling unit, efficiency living unit, guest room or suite of rooms in which there exists any of the following listed conditions shall be deemed and is hereby declared to be a substandard building:

(1) Deteriorated or inadequate foundations;

(2) Defective or deteriorated flooring or floor supports;

(3) Floor or floor supports of insufficient size to carry loads imposed or likely to be imposed with safety;

(4) Members of walls, partitions or other vertical supports that are split or that lean, list or are buckled due to defective material or deterioration;

(5) Members of walls, partitions or other vertical supports that are of insufficient size to carry imposed loads with safety;

(6) Members of ceilings, roofs, ceiling and roof supports or other horizontal members which have sagged, split or buckled due to defective material or deterioration;

(7) Members of ceilings, roofs, ceiling and roof supports or other horizontal members that are of insufficient size to carry imposed loads with safety;

(8) Fireplaces or chimneys which list, bulge or are settled due to defective material or deterioration;

(9) Fireplaces or chimneys which are of insufficient size or strength to carry imposed loads with safety;

(10) Electric wiring which is found to be overloaded, deteriorated or dangerous or to create a fire hazard;

(11) Plumbing which is inadequate or cross-connected or which permits syphonage or backflow, or which permits entry of sewer gases;

(12) Heating or ventilating equipment found to be unsafe whether from deterioration, faulty materials or workmanship, breakage or other causes;

(13) Faulty weather protection, including but not limited to deteriorated, crumbling or loose plaster, deteriorated or ineffective waterproofing of exterior walls, roofs, foundations or floors, including broken windows or doors; defective, broken, rotted, split or buckled exterior wall coverings or roof covering;

(14) Any other condition of a structure or part thereof which is found to constitute a fire hazard or a hazard to the health, safety or welfare of the occupants or of the public.

(b) Upon determining that such a condition exists, the building inspections director may order the owner, his agent or the occupant to correct such condition and may fix a time in the order within which the correction shall be made, and serve a copy thereof on the owner, his agent or the occupant and post a copy thereof on the building. It is unlawful for any person other than the building inspections director to deface or remove the posted notice.

(c) If the order of the building inspections direc-

tor is not complied with, he may proceed to enforce the penal provisions of this title or if the condition is found to be such that the structure is subject to demolition under the building regulations, the procedure set forth in said code for condemnation of a building shall be followed.

(d) Any building found to be substandard as set forth in this section hereby is declared to be a public nuisance, and maintenance thereof hereby is prohibited.

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70-5045

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. ~~6150~~

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,

Appellants,

vs.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

MOTION TO FILE A BRIEF AMICUS CURIAE

JOSEPH D. FRANK
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
191 College Street
Burlington, Vermont

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

MISC. NO. 6158

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,

Appellants,

vs.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

MOTION TO FILE A BRIEF AMICUS CURIAE

Vermont Legal Aid, Inc. moves the honorable Justices of the Supreme Court of the United States for leave to file a

brief amicus curiae in support of petitioner in this action. In support of this motion, Vermont Legal Aid, Inc. submits:

1. REFUSAL OF CONSENT -

That consent for the filing of an amicus curiae brief was denied by Respondent, Dorothea M. Normet, on May 26, 1971, through her attorneys Davis, Jensen, DeFrancq & Holmes. All other parties have consented to the filing;

2. INTEREST OF VERMONT LEGAL AID, INC. IN THIS PROCEEDING -

That Vermont Legal Aid, Inc. provides legal services to the indigent throughout the State of Vermont pursuant to grants from the United States Office of Economic Opportunity and the State of Vermont. It is the sole agency providing free legal services to the indigent in Vermont.

In the course of its representation of the poor, Vermont Legal Aid, Inc. represents about three hundred and fifty (350) clients per year in housing disputes. In the overwhelming majority of these cases, the Vermont Legal Aid client is being evicted - usually from substandard housing.. Vermont Legal Aid attorneys enter appearances and defenses in many of these cases. In fact, almost all litigated landlord and tenant disputes in Vermont are handled by Vermont Legal Aid Attorneys.

3. QUESTIONS TO BE BRIEFED BY VERMONT LEGAL AID, INC. -

This appeal presents substantial issues of the validity of state eviction procedures under the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. Appellants challenge both the one-sided and summary procedural rules that restrict the ability of the tenant to defend in a meaningful way and the establishment of rights to decent, sanitary housing coupled with the total absence of a remedy for violation of these rights.

The defects raised and questioned by appellant in the context of Oregon's Forcible Entry and Wrongful Detainer Statute are endemic to all jurisdictions. While there is every reason to believe that appellant will forcefully present the Constitutional issues against the distinctive background of Oregon Statutes, See Jurisdictional Statement, 7-32, a complete resolution of this contraversy necessarily involves an evaluation of the laws of other states and the impact possible decisions would have on these laws.

Vermont eviction procedures in some respects parallel those of Oregon and in others diverge significantly. For example, while

Oregon law preconditions an appeal upon the filing of a surety bond to cover rent from the date of the action forward, See Jurisdictional Statement, App. D. at 14, Vermont law allows an appeal only if a bond for past, present and future rent is given. See 12 Vt. Stat. Ann. §§ 2432(b), 4857 (1958). Thus, the Vermont Statute, in many instances, limits the availability of appeal to a greater extent than the Oregon statute. It is this type of procedural variation and the resulting effect on the ability of the indigent tenant to have meaningful access to the judicial process that petitioner respectfully requests to bring before the court as amicus curiae.

For the reasons above stated, the motion should be granted.

Respectfully submitted,

JOSEPH E. FRANK
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
191 College Street
Burlington, Vermont

MOTION FILED

JUL 13 1971

IN THE

70-5045

SUPREME COURT OF THE UNITED STATES

October Term, 1971

Misc. No. ~~6158~~

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated - - - Appellants

versus

DOROTHY M. NORMET,
THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and
ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH - - Appellees

Appeal from U. S. District Court
for the District of Oregon

MOTION OF LEGAL AID SOCIETY OF LOUISVILLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND
BRIEF OF LEGAL AID SOCIETY OF LOUISVILLE AS AMICUS CURIAE

(See Inside of Cover for List of Attorneys)

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

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DOROTHY M. NORMET
THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and
ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH - - - - - *Appellees*

MOTION OF LEGAL AID SOCIETY OF LOUISVILLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Legal Aid Society of Louisville, Kentucky, moves for leave to file the attached brief as *amicus curiae* in this case. The consent of counsel for the named appellants has been obtained. The consent of all of the named appellees or their counsel was requested but refused.

The interest of the Legal Aid Society of Louisville in this case arises from the fact that it regularly counsels and represents an extremely large number of low-

income tenants who are defendants in forcible detainer proceedings brought by landlords against them in the courts within the Commonwealth of Kentucky. The statutory law of the Commonwealth of Kentucky with respect to forcible detainer proceedings, and eviction thereunder, is similar in many respects to the statutory law of the State of Oregon relating thereto. Determination of the issues presented in this case as to the constitutionality of certain Oregon statutes would be applicable with like force and effect to similar Kentucky statutes. The Legal Aid Society of Louisville and its clientele has a common and real concrete interest in the decision in this case.

It is believed that the *amicus* brief that is tendered herewith contains additional arguments on the constitutional issues which, if accepted, would be dispositive of this case.

Respectfully submitted

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July 1, 1971

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

Misc. No. 6158

DONALD and EDNA LINDSEY, et al. - *Appellants*

v.

DOROTHY M. NORMET, et al. - - - *Appellees*

BRIEF OF LEGAL AID SOCIETY OF LOUISVILLE AS AMICUS CURIAE

May it please the Court:

STATEMENT OF AMICUS CURIAE

The Legal Aid Society of Louisville regularly counsels and represents an extremely large number of low-income tenants who are defendants in forcible detainer proceedings brought against them by landlords in courts within the Commonwealth of Kentucky. Because of the similarity between the forcible detainer statutes of Oregon and Kentucky, the decision of this Court in this case will have great impact in Kentucky as well as in Oregon.

The pertinent Oregon statutes are set out in the appellants' Jurisdictional Statement filed herein. Set out below are references to comparable Kentucky statu-

tes, decisions and practices in connection with forcible detainer proceedings and evictions thereunder in Kentucky:

Kentucky Revised Statutes 383.210 provides that the proceeding is begun upon complaint. However complaint may be oral as there are no written pleadings. Vol. 3A *Richardson's Kentucky Practice,* page 631, sec. 974; *Tolbert* v. *Young,* 172 Ky. 269, 189 S. W. 209; *Jolly* v. *Gilbert,* 190 Ky. 1, 226 S. W. 354; *Tinsley* v. *Majorana,* Ky., 240 S. W. 2d 539.

Kentucky Revised Statutes 383.210 provides that the warrant or writ of forcible detainer shall stand for trial upon three days notice. The date of service is counted as the first day.

Kentucky Revised Statutes 454.030 provides that the warrant or writ of forcible detainer may be served upon the defendant by posting a copy on the premises if the officer does not find the defendant or a member of his family over sixteen years of age. In almost fifty percent of the cases, the defendants are without knowledge of the pendency of the proceeding.

Kentucky Revised Statutes 383.210, 383.235 and 383.245 describe the purpose of the trial to be to "inquire" into the matter by "inquest" or "inquisition." But findings of guilty are entered without any inquiry in the vast majority of cases, solely because of failure of the defendant to appear.

Kentucky Revised Statutes 383.235 provides that "jurors" shall say whether the defendant is guilty of forcible detainer unless the jury is waived. Juries are virtually never impaneled in forcible detainer cases.

Kentucky Revised Statutes 383.245 and 383.255 provide for the issuance of a writ of possession three days after a finding of guilty of a forcible detainer if the defendant has not in the meantime filed a traverse and a traverse bond, with surety, to fully secure payment of the amount claimed. Many tenants are set-out on the street before they learn of the pendency of a forcible detainer proceeding. Low-income tenants are usually unable to make the traverse bond even if they knew of the proceeding.

There are no statutes or ordinances in Kentucky providing that tenants may off-set against rent the cost of making repairs to render the leased premises habitable for human occupancy.

ARGUMENT

(1) Tenants Have Property Interests in Leased Premises

When the owner of realty leases same he conveys an interest therein to the lessee, who becomes as much the owner of the right of possession of the leased premises as a grantee in a deed is the owner of the freehold. *Dan Cohen Realty Co.* v. *National Savings and Trust Co.*, 6th Cir., 125 F. 2d 288. A lease divests the owner for a given time of a certain estate in the realty, leaving to the owner a reversion. *Mattingly's Executor* v. *Brents*, 155 Ky. 570, 159 S. W. 1157; *Moore* v. *Brandenburg*, 234 Ky. 400, 28 S. W. 2d 477. In *Pikeville Oil and Tire Co.* v. *Deavors*, Ky., 320 S. W. 2d 782, the Court of Appeals of Kentucky said that "a lease is not only an executory contract, it is also a present conveyance or grant of a slice or an interest less than a fee, with conditions attached."

Although a lessee's interest is purely possessory, it is nonetheless a valuable property right within the meaning and protection of the Fourteenth Amendment of the United States Constitution.

(2) Due Process Requires a Fair Evidentiary Hearing Upon Adequate Notice Before Deprivation of Property.

There is nothing new or revolutionary in the decisions of this Court in *Sniadach* v. *Family Finance Corp.* (1969), 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, and *Goldberg* v. *Kelly* (1970), 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 287. In a long line of earlier cases, many of which are cited in appellants' Jurisdictional Statement, this Court had consistently held that the Fourteenth Amendment of the United States Constitution prohibits the deprivation of property, or a property right or interest, under color of state law, without a prior fair evidentiary hearing upon adequate notice. The *Sniadach* case merely applied those principles to pre-judgment garnishment in judicial proceedings. The *Goldberg* case applied the same principles to the termination of welfare benefits in administrative proceedings, and clearly and unequivocally spelled out the following procedural due process requirements that are applicable to both judicial and administrative proceedings:

(1) Timely and adequate written notice of proposed action.

(2) Meaningful time and place of hearing.

(3) Timely and adequate written notice of time and place of hearing.

(4) Effective opportunity to be present at the hearing and defend the proposed action in person and by counsel.

(5) Effective opportunity to confront and orally cross-examine adverse witnesses and present oral evidence and argument.

(6) Hearing to be conducted by an impartial person.

(7) Decision to be based solely on legal rules and evidence adduced at the hearing.

Subsequently, this Court held invalid a state statute that permitted local officials to forbid the sale of intoxicants to persons who by excessive drinking habits might become exposed to want or be dangerous to the peace, because there was no statutory provision for a fair hearing upon notice prior to such action *Wisconsin* v. *Constantineau,* (January 19, 1971), 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507. And later this Court struck down a state motor vehicle responsibility statute that provided for suspension of a drivers license and motor vehicle registration for failure to post bond after an automobile accident, because no pre-suspension hearing was provided by the statute. *Bell* v. *Burnson, Director Georgia Department of Public Safety* (May 24, 1971), —— U. S. ——, —— L. Ed. 2d ——, 91 S. Ct. 1586, 39 U. S. Law Week 4607. The decisions in both of those cases were based upon the lack of procedural due process guaranteed by the Fourteenth Amendment.

Citing the *Sniadach* and *Goldberg* cases, a three-judge United States District Court in the Eastern Dis-

trict of Pennsylvania held unconstitutional the statutes of the State of Pennsylvania permitting a distress sale of a tenant's property without a prior evidentiary hearing upon reasonable notice. *Santiago, et al.* v. *McElroy, et al.*, 319 F. Supp 284 (1970). In response to the argument that distress sales without hearings were a time-honored procedure, the Court said that "the blessing of age wears out" (at 295) and that the rights of the tenant to maintain a replevin action against his landlord for wrongful distraint does not compensate for the lack of due process in the distress proceeding (at 294). See also *Hall, et al.* v. *Garson, et al.*, 430 F. 2d 430 (5th Cir. 1970), stating that a state statute permitting peremptory distraint by a landlord without a hearing is contrary to the Fourteenth Amendment.

(3) Equal Protection Requires That Tenants Have the Right to Litigate on an Equal Basis With Landlords.

A forcible detainer proceeding is summary and has been described as quasi criminal in nature and in derogation of the common law. 35 American Jurisprudence 2d page 891.

The Oregon forcible detainer statutes, like the Kentucky forcible detainer statutes, and perhaps those of most other states, were enacted during an agrarian era of modified feudalism dominated by landed gentry. They are heavily weighted in favor of the landlord against the tenant. Witness such statutory provisions that: (1) Permit landlords to institute forcible detainer proceedings upon oral complaint and without

bond, but require tenants to give bond with security in order to prosecute an appeal; (2) permit constructive service of process in the proceeding by posting same on the premises with the result that tenants do not receive actual notice in innumerable instances; (3) establish unreasonably short periods of notice to tenants of the proceeding (sometimes only three or four days) with the result that tenants do not have adequate time to procure counsel or otherwise prepare for trial; (4) enable inferior courts (most of which are not presided over by judges or magistrates with legal training) to summarily enter findings and judgments against tenants for failure to appear, without the introduction of any evidence by landlords; (5) enable such inferior court judges and magistrates to disallow valid defenses excusing non-payment or rent, including failure of landlords to comply with the terms of leases, failure to make necessary repairs, and failure to maintain the premises in a condition fit for human habitation; (6) permit eviction of tenants by setting-out on the street their household furniture, equipment, clothing, effects and other property without landlords furnishing bond or providing for the warehousing or storage of such items.

Such anachronisms prevent low-income tenants from litigating on a parity with landlords, and are incompatible with modern concepts of Fourteenth Amendment guarantees of equal protection of the law.

(4) The Questions Presented Demand Judicial Solution.

Despite the increase in legislative representation of metropolitan areas resulting from the "one man-one vote" rule, most state legislatures remain dominated by rural members. Virtually all of them are dominated by property-owing members. Pragmatic realities of representative government indicate that state legislatures will not update forcible detainer statutes except to the extent required by judicial decree to comply with constitutional mandates. Fundamental constitutional questions are matters for courts rather than legislatures.

Forcible detainer statutes of most states, including Oregon and Kentucky, are relics of a past era and do not conform to the conditions of our contemporary urban society. These statutes affect the lives of increasing millions of citizens who rent houses and apartments in all types of housing developments and complexes. Individual landlords have been and are being supplanted to a considerable extent by corporations, and by state, federal and municipal governments acting through housing authorities. There exists a great and urgent need for judicial pronouncement of essential constitutional requirements for forcible detainer proceedings.

The *Sniadach* and *Goldberg* cases, *supra*, are dispositive of essential constitutional requirements for judicial and administrative proceedings, but it appears that federal courts may have to apply them to the specifics of a variety of judicial and administrative proceedings before state legislatures and administrative

agencies will take appropriate corrective actions. The Oregon forcible detainer statutes, which are involved in the present case, appear to be typical of forcible detainer statutes of many other states. A definitive decision by this Court with respect to the Oregon statutes would be an effective means of obtaining modernization of similar statutes in a number of other states, incuding Kentucky.

CONCLUSION

For the reasons set out above, the Legal Aid Society of Louisville, presents this brief as *amicus curiae,* with the belief that the opinion and judgment herein of the three-Judge District Court of Oregon should be reversed.

Respectfully submitted,

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Louisville, Kentucky 40202

July 1, 1971

The undersigned certifies that on the 8th day of July 1971, this Motion and Brief was served upon the parties by mailing copies thereof, postage prepaid, to: John H. Clough, Esq., 402 Senator Bldg., 732 S. W. 3rd Ave., Portland, Ore., 97204, Counsel for Appellants; Theodore Jenson, Esq., 623 S. W. Oak, Portland, Ore., 97204, Counsel for Appellee, Dorothy N. Normet; Judge William C. Beers, Multnomah County Court House, Portland, Ore., 97204, Appellee.

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IN THE

Supreme Court of the United States

October Term, 1971

Misc. No. ~~6159~~ 70 - 5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,
Appellants.

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court Of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF

Allen County Legal Aid Society
Butler County Legal Assistance Program
Legal Aid Society of Cincinnati
Legal Aid Society of Cleveland

(Continued on Inside Front Cover)

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Legal Aid and Defender Society of Columbus
Dayton Model Cities Comprehensive Legal Services
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Mahoning County Legal Assistance Association
Ohio State Legal Services Association
Scioto County Legal Aid Association
Stark County Legal Aid Society
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The Allen County Legal Aid Service, Butler County Legal Assistance Program, Legal Aid Society of Cincinnati, Legal Aid Society of Cleveland, Legal Aid and Defender Society of Columbus, Licking County Legal Aid Society, Lorain County Legal Aid Society, Dayton Model Cities Comprehensive Legal Services, Mahoning County Legal Assistance Association, Ohio State Legal Services Association, Scioto County Legal Aid Association, Stark

County Legal Aid Society, Summit County Legal Aid Society, Toledo Legal Aid Society, Advocates for Basic Legal Equality and the Tuscarawas Valley Legal Services Association hereby respectfully moves for leave to file the attached brief *amici curiae* in this case. The consent of the attorney for the respondent Dorothea M. Normet was requested but refused. The consent of the respondent William C. Beers, District Judge, was obtained. The consent of the attorney for petitioner was obtained.

The interest of the above mentioned legal aid societies in this case arises because the Forcible Entry and Wrongful Detainer statutes of Oregon are similar to the Forcible Entry and Detainer statutes of Ohio. Therefore the decision of the Court in this case will effect the clients represented by *amici* in eviction suits in Ohio. There are sixteen legal aid societies in Ohio rendering legal services to low income persons unable to afford private counsel. In a twelve month period these programs receive over 84,000 requests for assistance. Their clients' problems include disputes with local welfare departments, family problems, consumer, employment and other economic problems, criminal matters, juvenile delinquency and landlord-tenant and other housing problems.

A substantial majority of the families requesting our assistance live in, what are at best, slums. These intolerable housing conditions continue to exist and grow primarily because Ohio's legal apparatus has not responded to the pleas of those who wish to use the system as the avenue for change in this most basic area of human existence. Consequently, impoverished tenants believe it is futile to complain to a legal services attorney, if they are fortunate enough to have one, about their conditions of shelter. In reality, the courts will only deal with their

situation under negative circumstances; i.e., when they are to be evicted pursuant to Ohio's forcible entry and detainer procedure. Because of the inadequacies of this procedure, which is the subject of this brief, the courts refuse to hear their plight and, instead, order tenants to forfeit their homes which, however dilapidated, result in major losses and tragic disruptions of family life. Extremely low vacancy rates and overall poor housing conditions create a replacement market offering nothing but worse or similar property. Tenants who have improved their homes must, after being forced to move, reinvest this time and effort without any guarantee that in a few months they will not be forced to move again.

Although many families may have become resigned to their status under Ohio law, the legal services programs in Ohio have not. This brief will demonstrate that realistic legal remedies for all tenants in Ohio are nonexistent. This lack of remedies falls hardest upon the poor and no matter how resourceful the legal aid attorneys are, they are still faced with a forcible entry and detainer procedure and practice that denies them the opportunity to even present their clients' defenses to the court. In fact, eviction in Ohio is so partial toward landlords that it is often unnecessary for them to retain counsel.

Appeal of the inevitable adverse decision in the trial court is impossible since neither the legal services programs or their clients can afford the appeal bond which must be filed to stay the issuance of a writ of restitution. Consequently, the procedure and practice remains unchanged.

Another example of the lack of access to the courts suffered by low income persons in Ohio involves the extensive use of cognovit notes with warrants of at-

torney to confess judgment attached. Virtually any consumer in Ohio wishing to purchase an item on credit must sign a cognovit note. In so doing he ("waives" his right to notice and appearance and authorizes any attorney at law to appear on his behalf and confess judgment. Although a defense may arise after he signs the note his only recourse after judgment is to employ an attorney to file a motion to reopen the judgment. Since this Court has presently noted probable jurisdiction in an Ohio case which challenges this practice (*D. H. Overmyer, Inc. v. Frick Co.*, No. 1435) *amici* will not address the problem in this brief, but merely mentions it as an example of another area of law where due process rights are sacrificed for expediency and administrative efficiency.

Prior to this Court's decision in *Boddie v. Connecticut*, 401 U.S. 371 (1971), persons seeking divorce in Ohio could be denied the relief sought for nonpayment of court costs. Although prepayment waivers were available for persons filing poverty affidavits, many courts would not waive these costs at final hearing and would condition the granting of decrees on the payment of costs.

Disputes with local and state welfare departments are another area of concern to the disadvantaged. In Ohio, when a recipient of, or applicant for assistance obtains an adverse decision from the State Department of Public Welfare pursuant to a "fair hearing" conducted by the Department there is no appeal to the Ohio court system and the recipient's only recourse is to initiate a suit in Federal District Court or State Court. The Department of Public Welfare is not subject to Ohio's Administrative Procedure Act in promulgating its regulations or in conducting hearings on individual recipient's grievances.

Amici have cited examples of deprivations suffered by low income persons attempting to litigate in good faith in Ohio. The absolute prohibition of waiver of court costs in federal bankruptcy proceedings is one example of such a deprivation in the federal system.

Although only the issue of the constitutionality of certain sections of Oregon's forcible entry and detainer statutes are before this Court *amici* believes there is a much broader issue that must ultimately be resolved.

This brief is submitted to demonstrate that access to the courts for indigents is blocked in Ohio, as in Oregon, and that this deprivation exists in almost every problem area encountered by the poor.

Amici believe that the interest of the public and consequently the nation, is best served by a court system open to all persons regardless of economic status or standing in the community. The tenant, the consumer, the welfare recipient, and the potential bankrupt should all have the same ease of entry into the system as their adversaries now enjoy. We support the appellants in this action and respectfully move the Court for leave to file the attached brief *amici curiae*.

Respectfully submitted,

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ARGUMENT

I. OHIO'S FORCIBLE ENTRY AND DETAINER PROCEDURE DENIES TO THE IMPOVERISHED TENANT THE RIGHT TO PREPARE, DEFEND, AND COUNTERCLAIM AGAINST HIS LANDLORD'S DEMAND FOR POSSESSION; PROHIBITS HIM FROM APPEALING AN ADVERSE TRIAL COURT DECISION; AND ALLOWS FOR THE PERPETUATION OF A COMMON LAW BASED INTERPRETATION OF LANDLORD-TENANT RELATIONS WHICH HAS NO RELEVANCE IN TODAY'S SOCIETY.

Impoverished tenants in Ohio presently live within a legal system which both denies them any protection from landlords who willfully let their property become unfit for purposes of human habitation and allows evictions to take place at the whim of the property owner. The rules of law and statutes which define the landlord-tenant relationship are derived from concepts ancient in origin and totally unrealistic in today's society. Having its most direct impact on the poor, the system provides a haven for those who wish to exploit the most vulnerable members of our society and denies to the poor the opportunity to seek redress in the courts. Recent events indicate the disastrous consequences of allowing the continuation of such inequities.

In essence, the legal barriers confronting Ohio's tenants result from a merger of the common law definitions of the landlord-tenant bargain and the statutory forcible entry and detainer procedure. By describing both facets of this interrelationship, this brief will attempt to show the realities of the low-income tenant's dilemma.

A. *Tenants in Ohio are removed from their homes pur-*

suant to a forcible entry and detainer process which does not allow them to contest in any meaningful way the demand of landlords for possession.

Forcible entry and detainer in Ohio, a statutory remedy not found in the common law, deals solely with the question of possession of real property. *Haas v. Gerski*, 175 Ohio St. 327 (1963); *Kuhn v. Griffin*, 3 Ohio App. 195 (1964). Being summary in nature, it creates a situation whereby a family can be peaceably occupying a residence on one day, be ordered to vacate within the next several weeks pursuant to a court order, and if they have not left within ten days of the order, be physically removed along with all their possessions by the sheriff. While this process is taking place, the tenant is often unaware of what is happening until days after the court's issuance of the writ of restitution at which time it is too late to respond.

The procedure effectively denies to tenants the right to reasonable notification of pending litigation, the opportunity to respond thereto, and the right to appeal from an adverse decision.

An action in Forcible Entry and Detainer can be initiated only if the landlord has first notified the tenant three days prior to filing the action to vacate the premises by handing him a written copy of the notice or by leaving it at his usual place of abode. Ohio Rev. Code §1923.04. If the tenant does not leave, a complaint is filed in the appropriate court, (Ohio Rev. Code §1923.01) with the summons to appear in court being served on the tenant at least three days before the trial day. Ohio Rev. Code §1923.06. The tenant cannot be granted a continuance of his trial for more than eight days unless he posts a bond approved by the court, conditioned for the payment of rent that may accrue. Ohio Rev. Code

§1923.08. After an adverse judgment, the court issues a writ ordering the tenant to leave the premises, (Ohio Rev. Code §1923.13) which the sheriff executes within ten days by restoring the premises to the landlord. Ohio Rev. Code §1923.14. To stay execution upon appeal, the tenant must file his notice of appeal and post a bond approved by the court, Ohio Rev. Code §1923.14.

The initial unfairness inherent in the Ohio eviction procedure involves the unreasonable limitation placed on the amount of time made available to the tenant for purposes of responding to the actions of the landlord. The tenant's first awareness of the possibility of pending litigation should be when he receives the three-day written notice to leave. However, this is often not the case, due to two basic faults inherent in this requirement. First, because of the lack of adequate statutory standards, the form of the notice and the process of actually delivering it is so often abused that the intended recipient is usually unaware of its existence. Hand delivered notices are frequently given to any young child that answers the door of the tenant's residence while the others are usually left in hallways or in piles of junk mail that have gathered near the cluster of apartment mailboxes. Since the statute requires no particular form for the notice as long as it contains the required language, such notices are handwritten or poorly typed on small pieces of paper which are usually overlooked or assumed to be scrap paper by those tenants that do actually receive them. Further, the notice need not indicate why the tenant is being evicted but only that the landlord wants him to leave. Second, and of basic importance, the three days within which the tenant must decide what course of action to take is clearly not a reasonable time to allow for the making of such a deci-

sion. If the landlord intends not to proceed with litigation provided the rent is paid within the three days, the time is not enough for a tenant, especially one of low income, to acquire the money to make such a payment or decide whether the money is in fact due the landlord. On the other hand, if the landlord desires to actually remove the tenant, whether with or without justification, the three days allow the tenant no time to even begin to prepare for his defense against the landlord's pending complaint, much less develop any cause of action that he has against the landlord.

The unreasonableness of the time period becomes more obvious when it is realized that once the complaint has been filed the statute provides that service of summons need only be three days before trial, during which time the tenant must contact a lawyer, develop his defenses, gather evidence, prepare possible counterclaims and, on the third day, litigate the issues. The practical result is that tenants are unable to even attempt to defend themselves much less present the kinds of sophisticated, complex, legal and factual arguments necessary to their case which could be made if given enough time. Often, it is not even possible to contact a lawyer within the three day period. Even if the tenant is able to begin preparation for trial, he is barred by statute, from gaining a continuance for more than eight days, no matter how meritorious his reasons, without first giving a bond equal to the rent that may accrue if judgment is rendered in the landlord's favor. Even this inadequate amount of time is unavailable to the impoverished tenant since these continuances will normally be granted only on condition that the amount of the bond is equal to *all rent* claimed to be owing in the past plus all future accruing rent. Thus, the tenant is asked to post a sum of

money which he cannot possibly acquire, and must do so prior to any judicial determination that the money is in fact owed.

In the great majority of cases, the trial itself is held in the presence of only the judge and the landlord or his attorney. Tenants often fail to appear in court because they realize the futility of arriving without an attorney or are confused with the judicial process itself. Those that do appear without representation are shuffled through the court with the same haste normally found only in traffic courts, even though the tenant is faced with losing the very home he lives in.

On the average day, twenty or thirty eviction "trials" are set to be heard in the same court at the same time, normally 9:00 a.m. The resulting confusion is heightened by the rapidity with which cases are called and decisions are rendered. Tenants who arrive late or who miss the reading off of their names by the bailiff, are found guilty by the court without even appearing before it. Only the landlord and the judge realize the full implication of what is taking place.

For those tenants who have retained counsel, little benefit will be gained from this representation because the only defenses allowed to the landlord's demand for possession are that either the rent had been paid or that the tenant did not receive a proper three-day notice. As will be demonstrated all other issues have been foreclosed by appellate decisions which, though highly questionable, are beyond the reach of the trial court.

In order to evaluate the courts refusal to hear other defenses and their attitude that the property owner's right to possession is somehow sacrosanct, it is necessary to put the landlord's demand in its proper context. Typically, the tenant will be living in a dilapidated, rat

infested structure which has been nominally maintained, if that, by the owner. Housing and building code violations exist on the property which, because of neglect or inability, have not been enforced by the municipality. Eventually, the tenant, after having made numerous demands of the landlord to repair the property, will refuse to pay any rent until either the repairs have been made, or the cost of repairs by the tenant have been deducted from his rent. In response, rather than remedying the situation, the landlord initiates the forcible entry and detainer process. Throughout this time, the tenant's basic argument is that he is willing to pay his rent but will only pay for what he had bargained for, namely, a safe and habitable dwelling. He will not pay his rent if the landlord has breached his agreement or warranty, whether express or implied, that the premises will be maintained in a liveable condition.

Despite these circumstances, on the day of trial, the court rules that the only issues which can be litigated are the two issues raised by the landlord of back rent and right to possession in which the only defenses of the latter are the two enumerated above. However, the issue of money damages is treated in the same manner as any other contract claim thus allowing the tenant twenty-eight days to answer the complaint, the right to counterclaim and, in general, the opportunity to benefit from the same procedural safeguards enjoyed by any other litigant. In practice, if the tenant contests the money damage issue, the landlord, who will gain no economic benefit by proceeding with the litigation since it may well involve a full trial with all the expenses that would entail, dismisses the second cause of action, the court rules in his favor on the issue of possession, and the

tenant is forced out on the street without being allowed to raise any of the issues basic to his situation.

As a result, the tenant is left with the choice of either appealing the lower court's ruling, initiating an original action against the landlord based on a variety of contractual arguments, or both. The question of appeal cannot be given serious consideration since the appeal bond required by the court will be in an amount equal to six or eight months rent which, of course, the tenant will be unable to raise. The idea of bringing an original action is not feasible for very practical reasons; that is, the court's docket is such that the case will not be heard on its merits for several years; a private attorney would probably have to be retained at a fee which would in all likelihood be in excess of any potential money judgment, and the benefits to the tenant are minimal since he has already lost the most important aspect of the case, namely, the right to possession. Consequently, no recourse at law is available for the tenant while the landlord is free to continue leasing his slum property without having to concern himself with the need to maintain it in a condition compatible, or in accordance with the mandate of law obtaining in the local housing codes.

B. *Because impoverished tenants are denied the right to appeal in forcible entry and detainer cases, Ohio's interpretation of the landlord-tenant relationship will remain unchallenged and will continue to be used by landlords as justification for not having to maintain their rental property.*

The doctrine of defense of home relates back to the time when men emerged from their caves and sacrificed their individual powers (physical strength) in exchange

for a rule of law (employment of the collective conscience of all men). Many hapless tenants of today may ponder the wisdom of this bargain.

Present Ohio definitions of the landlord-tenant relationship, being grounded in the common law are supported by an analysis totally unrealistic to today's urban industrial society. Historically, a lessee's rights were first considered to be solely contractual in nature. However, beginning with the sixteenth century, a notion developed in property law that a lease constituted a conveyance of an interest in land whereby the tenant, whose primary concern was with the land and not the buildings thereon, would inspect the premises, acquire an ownership interest in the land subject to the doctrine of *caveat emptor* and thereby became both owner and occupier of the land for a term. No further consideration was due from the landlord once the land was leased. 6 *Williston, Contracts* §90 (3d ed. 1962). Consequently, since these rules developed before the establishment of the contract law doctrine of mutually dependent covenants, any promise by the landlord to repair or maintain the property was considered to be independent from the right of the landlord to collect his rent. 3 *Williston, Contracts* §890 (Rev. ed. 1936). The only legal recourse available to the tenant once the lease had been finalized was an action based on fraud or mistake in the initial transaction. As a result, the tenant who, for example, leased a tumbledown house, *Robbins v. Jones,* 15 C.P.N.S. 221, 240, 143 Eng. Rep. 768, 776 (1883), or whose house was destroyed by fire was obligated to continue paying rent during the term of the lease. *Pardine v. Jane,* 82 Eng. Rep. 897 (K.B. 1847).

It is arguable that, in previous centuries, the conveyance of land theory was supported by a valid appraisal

of the intended bargain of both parties. The tenant did use the land for farming or grazing, was able to determine the value of the land, had the skills to repair or rebuild the essentially simple structure he lived in, and, in general, could deal at arms length with the landlord. However, as society emerged from its agrarian setting, these underlying assumptions became clearly fallacious when used to explain the actual tenancy relationship. Today, tenants rent building space, not land. Their bargain is not for the use of land upon which to earn a living but for the right to live in a safe and sanitary dwelling. Tenants generally are unable to inspect premises for latent defects or make repairs when necessary, due in part to the complexity of modern dwelling structures. In short, the factual underpinnings of the conveyance theory have been eliminated but in many instances the legal conclusions drawn from it have survived.

In Ohio, the courts have long recognized that the lease gives the tenant no interest in the underlying land. *Winton v. Cornish,* 5 Ohio 477 (1832). However, awareness of this fact has had no seeming effect on their understanding of what the tenant actually bargains for. As an example:

> "In the absence of statute, ordinance, express stipulation or covenant, the lesser is not bound to make repairs or improvements; there is no implied covenant to make repairs. The owner of real property may lease the same in whatever condition it exists at the time for the lease, and he does not impliedly warrant that the premises are tenantable or safe, or fit for the purpose for which they are to be used. In the absence of expressed agreement or warranty, even though the defect is structural, the landlord is under no duty to make repairs, replacements, or other improvements." 33 *O. Jur. 2d, Land-*

lord and Tenant, §18 (1958); *Burdick v. Chedale*, 26 Ohio St. 309, (1875); *Shidelbeck v. Moon*, 32 Ohio St. 264, (1877); *Goodall v. Deters*, 121 Ohio St. 432, (1929); *Cincinnati Oakland Motor Co. v. Meyer*, 37 Ohio App. 90, (1930).

Being under no obligation to repair, absent special agreement, the landlord's failure to repair is not an eviction excusing the nonpayment of rent, 33 *O. Jur.* 2d, *Landlord and Tenant* Sec. 18 (1958). *Linke v. Walcot*, 26 Ohio C.C. 10, *aff'd*, 69 Ohio St. 531 (1903). And even when he has expressly promised to repair, unless his refusal to repair is "negligent and perverse" breach of such agreement does not excuse nonpayment of rent during the period the tenant remains in possession since covenants to repair and pay rent are treated independently. 32 *Am. Jur., Landlord and Tenant* 511; *Sibley v. Ross*, 8 Ohio N.P. 655, *aff'd*, 52 Ohio St. 668 (1895).

As a result, when the Ohio common law is coupled with the statutory forcible entry and detainer procedure, where only the right to possession is at issue, the insurmountable barriers facing the impoverished tenant who wishes to change his housing situation become clear. Since his basic need is for a place in which to live, the tenant is faced with the Hobsons choice of either remaining mute and continuing to pay rent for the use of a dilapidated, dangerous structure or using his single weapon, the withholding of rent payments until services are provided, only to be faced with the threat of being legally ordered off his premises and forced to find residence in equally poor housing.

The dilemma becomes more outrageous when the existence of building and housing codes are taken into consideration. Such regulatory controls, enacted pursuant to local police powers, have been adopted beginning in

the mid-nineteen fifties in numerous Ohio municipalities. These local ordinances, couched in criminal law terms, command the landlord, under penalty of fine or imprisonment, to maintain his property in a condition not injurious to the safety and health of the occupants or the surrounding citizenry.

In Cleveland, for example, the Housing Code provides:

> "No owner, operator or agent shall rent or lease or offer for rental or lease for residential occupancy any dwelling units, dwelling structures, or any part thereof which does not comply with the standards for residential occupancy contained in Chapters 5, 7, and 11 of the Code." Housing Code, Ch. 7, §6.0701.

Chapter 5 of that Code prescribes Basic Standards for Residential Occupancy. Chapter 7 contains Additional Standards for Residential Dwellings, and Chapter 11 makes it unlawful to rent premises without first obtaining a Certificate of Occupancy indicating that the premises comply with all applicable laws. The Ordinances of Columbus, Housing Code, §739-59, contain a similar proscription:

> "No person shall occupy as owner or occupant or let to another for occupancy any dwelling or dwelling unit, for the purpose of living therein, which does not comply with the requirements set forth in this chapter." Ch. 4525.01.

The Cincinnati Building Code states that "[n]o owner or operator shall occupy or let to another any vacant apartment or household unit unless it is reasonably clean, sanitary and fit for human occupancy." Housing Code, §1250.25(b).

These codes, though imposing duties to make repairs on property owners which render obsolete the common rules including the legal cliche of *caveat emptor*, have

generally failed to benefit tenants. Lax and ineffective enforcement procedures in which the municipal agency and not the most critically interested party, the tenant, determine how and when to proceed against the landlord, have had no noticeable effect on housing in areas where the poor live. See Gribetz & Grad, *Housing Code Enforcement: Sanctions & Remedies,* 66 Colum. L. Rev. 1254 (1966); Note, *Enforcement of Municipal Housing Codes,* 78 Harv. L. Rev. 801 (1965). At the present, the tenant can only initiate the enforcement process by reporting suspected violations but cannot insure that any action will be taken. Sax & Heistand, *Slumlordism as a Tort,* 65 Mich. L. Rev. 869, 871 (1967). Thus, the tenant's bargaining position is no better than before adoption of the codes since the landlord does not fear prosecution under the codes and knows that the trial courts will not hold that implicit in every lease agreement is the landlord's obligation to maintain his premises up to code standards.

Ohio Courts have not had to re-examine their views of the legal relationship between landlords and tenants and the effect housing codes have had on the duties owed by the property owner because tenants have been, in reality, barred from presenting their arguments on these points to the appellate courts. Trial courts will not hear the arguments because of their allegiance to the doctrine of *stare decisis.* Tenants who wish to bring original actions against landlords are unable to do so because, among other things, the landlord will simply refuse to accept their rent once the action is filed and proceed to evict them. And, if after attempted negotiations the landlord refuses to make repairs and the tenant declines to continue paying his rent until repairs are made, the landlord can use the court with impunity to evict him since

the tenant's reasons for withholding payment will not be heard by the trial court.

Since rent withholding presents the only realistic way for a tenant to force his landlord to maintain their properties, the tenant's voice will not be heard on these issues until he is allowed to appeal his eviction to the appellate courts. And this will not take place until the appeal bond restrictions of Ohio's forcible entry and detainer statute are removed. At present, the trial court's statement to an indigent that his appeal will not be decided for at least six months and in order to maintain the appeal he must deposit in one lump sum an amount of money equal to six months rent plus costs means that the tenant cannot appeal his case; that the courts are closed to him because he is without economic means. Since the evils of poor housing primarily effect indigent families, this denial of the right to appeal will allow the situation to remain unchanged.

In conjunction with the right to appeal, it is implicit that the tenant be given the opportunity to adequately prepare for trial and make a trial record on all issues to be raised before the appellate court. In an eviction case, this would entail contacting an attorney, investigating deficiencies in the property, checking housing code enforcement records, interviewing witnesses, conducting legal research, and generally performing matters necessary to the preparation of a defense. Ohio's statutes, however, allow for the trial to be held three days from date of service, Ohio Rev. Code §1923.06, and a continuance of more than eight days is not permitted without the posting of a bond, Ohio Rev. Code §1923.08. In direct contrast, defendants in other Ohio civil cases have twenty-eight days to answer complaints, (Ohio Rules of Civil Procedure, Rule 12(A)) and enjoy other protections to

gain sufficient time to prepare for trial. No justifiable rationale exists for allowing this segregation of the tenant from other civil litigants who share the common desire of wishing to adequately defend themselves in court. Certainly it is as important for society to allow an individual to defend his home as it is for example, to make available to an insurance company the opportunity to do all it can to limit the amount of assets it will have to pay to someone injured by one of its policy holders.

Although the issues presented in this case are based on Oregon's Forcible Entry and Detainer procedures, this Court's ruling will have a clear impact on all impoverished tenants in Ohio. Meaningful access to the judicial process has been denied to them for too long. By removing the currently existing procedural roadblocks, this Court will make the avenues of legal reform available to tenants and ultimately leave to Ohio courts the necessary task of reshaping its own landlord-tenant law.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~6150~~ 70-5045

DONALD LINDSEY, *et al.*,

Appellants,

— v. —

DOROTHEA M. NORMET, *et al.*,

Appellees.

On Appeal From the United States District Court
For the District of Oregon

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NEW HAMPSHIRE LEGAL ASSISTANCE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 6158

Donald and Edna Lindsey, and All Other Persons Similarly Situated,

Appellants,

— v. —

Dorothea M. Normet, the Honorable William C. Beers, in his Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and all Persons Similarly Situated Holding Office As Judges of The District Court of the State of Oregon for the County of Multnomah,

Appellees.

On Appeal from the United States District Court For the District of Oregon

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND STATEMENT OF INTEREST OF THE AMICUS

Movant New Hampshire Legal Assistance respectfully moves the Court for permission to file the attached brief *Amicus Curiae* for the following reasons, the reasons assigned also disclose the interest of the *Amicus:*

1. That the New Hampshire Legal Assistance is a legal service project funded by the Office of Economic Opportunity to provide free legal services for the poor of New Hampshire;

2. That as the entity charged with the primary responsibility for providing free legal services to the poor of New Hampshire, the *Amicus* represents many poor people in eviction cases. An eviction, due to the severe climate in this area during the winter months, constitutes an extremely hazardous occurrence for poor families. In addition, there is a shortage of low-income housing throughout the state;

3. That present New Hampshire eviction statutes deter the low-income tenants at will from having meaningful access to court and a fair hearing in court on their defenses to an eviction action;

4. That the decision of the Court on the constitutionality of the challenged statutes in the case of *Lindsey v. Normet* will have a substantial effect on the eviction laws of New Hampshire which are similar to those of the State of Oregon;

5. That counsel for Appellants and the Appellee Beers have consented to the filing of a brief *Amicus Curiae* by the movant. Counsel for the Appellee Normet has not consented.

WHEREFORE, movant prays that the attached brief *Amicus Curiae* be permitted to be filed with the Court.

Respectfully submitted,

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ATTORNEYS for New Hampshire
Legal Assistance

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 6158

Donald and Edna Lindsey, and All
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Dorothea M. Normet, the Honorable William C. Beers, in his Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and all Persons Similarly Situated Holding Office As Judges of The District Court of the State of Oregon for the County of Multnomah,

Appellees.

On Appeal from the United States District
Court for the District of Oregon

BRIEF AMICUS CURIAE

STATEMENT OF THE CASE

The *Amicus* adopts the "statement of the case" as set forth in the Appellants' brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief will explain the present functioning of eviction statutes in the State of New Hampshire. It is the belief of the *Amicus* that this Court's determination of the constitutional questions raised by the Appellants will have a fundamental effect on the eviction laws of New Hampshire since the Forcible Entry and Wrongful Detainer statutes, hereafter referred to as F. E. D. statutes, of Oregon are similar in procedure and in effect to those of New Hampshire.

It is not the intent of this *Amicus* to present detailed arguments on the unconstitutionality of Oregon's statutes since it is the *Amicus'* belief that the Appellants will present those arguments thoroughly. It is the intent of this *Amicus* to demonstrate to the Court that the injustices inflicted by the eviction statutes of Oregon are also inflicted by the eviction statutes of New Hampshire.

Not only does *Amicus* agree with the Appellants that such statutes violate the Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, but also *Amicus* would challenge said statutes for violating the right to petition the government for redress of grievances, as protected by the First Amendment.

There is no dispute concerning the existence of a housing crisis throughout the State of New Hampshire. There was a

Housing Crisis Conference sponsored by several state agencies at the University of New Hampshire on November 3-4, 1969. At this Conference, Governor Walter R. Peterson stated:

> "And even so informal a survey as daily reading of the classified columns of the press in our largest industrial centers appears to bear out the conclusion that adequate housing, in a quantitative sense, is not available. This is particularly the case when we consider what is needed for housing workers and their families at prevailing income levels." ("New Hampshire's Housing Crisis Conference Proceedings," Report of the University of New Hampshire, Durham, New Hampshire, November, 1969 p. 79).

Other speakers at this conference portrayed a clear and dramatic presentation of the inadequacy, unavailability, and unfitness of a substantial amount of low and moderate income housing in New Hampshire. *Amicus* contends that the present housing crisis has developed to a large degree because of our archaic eviction laws which allow a landlord to use the judicial system to continually evict tenants who have justifiable complaints and then rent again these substandard dwellings, frequently at inflated rental rates, without fear of any economic loss or penalty.

The New Hampshire statutes on evictions are set forth in Revised Statutes Annotated, Chapter 540, hereafter referred to as RSA 540, significantly entitled "Actions Against Tenants." There is no chapter entitled "Actions Against Landlords." RSA 540 has been reprinted in the Appendix. This Chapter has remained substantially unchanged since its original enactment on July 1, 1831. See the Laws of New Hampshire, Vol. 10, Second Constitutional Period 1829-1835, Concord, New Hampshire (1922) pp. 229-231.

Under the present statutes, tenancies at will may be terminated by a notice in writing to vacate the premises at a specified day, RSA 540:2. The span of time between the service of notice to vacate and the day set for vacating must be equal to the rental payment period. When nonpayment of rent is alleged as reason for the eviction, then seven (7) days' notice is sufficient, RSA 540:3.

Customarily in New Hampshire, the low-income tenant is a tenant at will and rents by the week. Therefore, such a tenant would receive seven (7) days' notice to vacate. In the event that the tenant fails to vacate on the day specified in the notice, the landlord may recover the premises without recourse to any legal process, RSA 540:12 and further, he may remove the belongings of the tenant, if this may be done peaceably. See *Weeks v. Sly*, 61 N. H. 89, 90 (1881).

However, it is the usual procedure for a landlord to commence a lawsuit in the local district or municipal court by serving a writ of summons, RSA 540:13 (supp.), which requires the physical appearance of the tenant on the return day in that local court. This writ of summons must be served at least seven (7) days prior to the return day.

Unlike most other civil lawsuits the return day of the writ of summons is the day of the trial and judgment is usually rendered on that day, RSA 540:14 (supp.). The losing tenant has three (3) days after judgment to file an appeal, RSA 540:20 (supp.), provided that sureties are furnished, RSA 540:25 (supp.). If no appeal is taken, a writ of possession, RSA 540:14 (supp.), is issued to the landlord who may take whatever steps are necessary to oust the tenant. Frequently the sheriff is given the duty to serve the writ of possession on the tenant to insure that the tenant vacates the premises at once.

In New Hampshire there are ten superior courts, one for each county, and sixty-eight local courts which are designated as either district or municipal. Eviction actions must initially be commenced in these local courts and not in a superior court.

The latest Report of the Judicial Council of the State of New Hampshire, December 31, 1970, pp. 90-97, lists the number of landlord and tenant actions entered in the local courts. In 1968 there were 476 such actions and in 1969 there were 607 actions. The number of all civil actions, i.e. not only landlord and tenant but other civil actions, which were transferred for trials to the superior courts in 1968 was 13 and in 1969, the number was 60.

Landlord actions against a low-income tenant are rarely transferred for a trial *de novo* to superior court because of the financial inability of the low-income tenant to post the required sureties. This failure to have meaningful access to the courts denies fundamental rights to protect a basic need for life such as shelter.

The New Hampshire eviction statutes are analogous to Oregon's F. E. D. statutes. The eviction statutes of these states prevent the indigent tenant from a free and meaningful access to the courts because of the nature of the procedural steps before, during, and after the eviction trial in the local court. The affluent tenant can avoid the injustices of these procedural steps since such a person can afford the required bond in order to secure a trial *de novo* in a superior court.

This Court recognized in *Boddie v. Connecticut*, 401 U. S. 371 (1971), the principle that free access to the courts is fundamental to the protection of certain rights. The rights

involved in *Lindsey v. Normet* are exactly analogous to those in *Boddie, supra.*

First, the interest in habitable housing is fundamental.

Second, the judicial system is the exclusive remedy for adequate protection of these fundamental rights.

The bond requirements of Oregon and New Hampshire, just as the filing fees in *Boddie, supra,* seriously inhibit the protection of fundamental rights which only access to the courts can protect. See Mr. Justice Black writing in *Meltzer v. G. Buck LeCraw & Co.*, 39 U. S. L. W. 3483 (May 3, 1971.)

ARGUMENT

BY THEIR PROCEDURAL STRUCTURE OREGON AND NEW HAMPSHIRE EVICTION STATUTES WHEN APPLIED TO INDIGENT TENANTS ARE A DENIAL OF FUNDAMENTAL RIGHTS PROTECTED BY THE CONSTITUTION OF THE UNITED STATES.

Commencing with the preliminary procedures prior to the eviction trial, RSA 540 is defective. It is not necessary that a New Hampshire landlord give specific pleadings in the writ of summons, RSA 540:13 (supp.).

Further, there is no provision in the New Hampshire eviction statutes for any continuance. It is the experience of the *Amicus* that if a New Hampshire tenant seeks a continuance, the local court denies such request and informs the tenant that he may have all the time he needs by furnishing the sureties pursuant to RSA 540:25 (supp.), and thereby taking an appeal to the superior court where he will

receive a trial *de novo*, *Wilder v. Kneeland*, 94 N. H. 185, 49 A. 2d 506 (1946).

The New Hampshire tenant also suffers from an insufficient time to prepare for a defense to the eviction action. Customarily the span of time in New Hampshire from the service of the notice to vacate to the trial in the local court is about two to three weeks.

In the local courts of New Hampshire, tenants are not provided a fair hearing on their defenses. Such defenses as housing code violations, failure of consideration, unclean hands, illegality of contract, and retaliatory eviction have never been recognized as defenses to the termination of a tenancy at will in New Hampshire. The New Hampshire Supreme Court has never decided any case which involved those defenses. It has been the experience of the *Amicus* that when such defenses are raised, the local trial court requires the tenant to litigate those defenses in the superior court.

The only recognized defenses to the eviction of a tenant at will are that the landlord did not give a proper notice to quit or that he failed to make a demand for rent if the eviction is based on nonpayment of rent, or that there was an improper service of the writ of summons.

In New Hampshire, equitable defenses can be raised in the superior court. Tenants are usually unsuccessful in attempting to present equitable defenses in the local court.

If the tenant chooses to raise the issue of title, then no trial is had in the local court, RSA 540:18 (supp.). The local court must then require the tenant to furnish sureties and to pay all rent then due or which shall become due pending the trial of the matter in a superior court, RSA 540:17 (supp.).

Thus the indigent tenant is deprived by this surety requirement of any trial whatsoever when the issue of title is raised. Recently, the Supreme Judicial Court of Maine held a similar Maine statute unconstitutional, *Harrington v. Harrington*, Me., 269 A. 2d 310 (1970).

On the other hand, if the issue of title is not raised in the local court, a trial will be held on the return day. Thus, although it appears that every New Hampshire tenant is afforded his day in the local court, in reality the trial is not a full and complete trial. Further the local courts are only too willing to transfer the matter to a superior court for trial if the tenant furnishes the sureties. Not only is the trial in the local court insufficient, but the judges of the local courts are usually part-time judges. In addition there are no formal rules of court applicable to these local courts, nor is there any stenographic record of the trial unless a party is willing to pay for this record. Recently, the Chief Justice of the Supreme Court of New Hampshire commented on the need to improve the procedures governing the handling of civil cases in the local courts, *Briand v. Wild*, 110 N. H. 373, 376, 268 A. 2d 896, 898 (1970).

Following the trial in the local court the losing party, be it the landlord or the tenant, is required to post sureties if he or she wishes to have a trial *de novo*, RSA 540:24 (supp.) and 25 (supp.). Rarely does a landlord lose against a tenant at will. Moreover, while the tenant must post sureties to pay damages to the landlord, the landlord is not required to post any sureties for damages. Perhaps the most blatant statute which clearly shows the preferential treatment afforded the landlord is RSA 540:23. By its provisions, the landlord may recover exemplary damages when the tenant does not prevail in the superior court. No provision exists for the tenant to recover any exemplary damages if the tenant prevails in the

superior court. See *Woodbury v. Butler*, 67 N. H. 545, 548, 38 A. 379, 380 (1894).

Whether the bond required from an indigent tenant by RSA 540:17 (supp.) and 540:25 (supp.), may be waived has not been determined by the New Hampshire Supreme Court.

However, there is hope for the indigent tenant in New Hampshire. Recently, the Supreme Court in *Kline v. Burns*, 111 N. H. _____, 276 A. 2d 248, 252 (1971), held that there exists an implied warranty of habitability imposed by law on the basis of public policy. This was a major change from the common law of New Hampshire. Thus, a tenant at will who is being evicted for nonpayment of rent may now be able to raise the defense that he does not owe as much rent, if any, as the landlord claims when there exist substandard conditions in the rented premises. Nevertheless so long as the bond statutes remain in effect, the warranty of habitability will have a minimal impact in eviction proceedings. Few tenants will expect justice since they cannot raise the required sureties. By such statutes, tenants in New Hampshire and Oregon are denied their constitutional rights.

CONCLUSION

The local trial court is quoted in *Kline v. Burns*, 111 N. H. _____, 276 A. 2d 248, 249 (1971), as stating that the tenants have the option of not entering the tenancy or vacating the premises when the latent defects become known. This opinion is not uncommon amongst those who have sufficient resources to secure alternative rentals. In most cases low-income tenants have no such alternative rentals. Low-

income tenants have few, if any, resources and frequently, many children. If they are members of a minority group, they are often victims of prejudice as well.

The argument that the low-income tenant may secure a lease is fallacious because it is a landlord's market and such leases, when given, are often in the nature of adhesion contracts. These arguments raised against the low-income tenant at will are therefore unrealistic.

The legislature of New Hampshire recognized the need and desirability of insuring adequate housing by adopting legislation granting to municipalities the power to establish and enforce minimum standards for use and occupancy of dwellings, RSA 48-A. However, even where housing codes have been adopted, public enforcement has been less than satisfactory. This recently led the City of Nashua, New Hampshire to pass an ordinance allowing private citizens to file complaints in court against landlords for housing code violations. Nevertheless, the tenant who files such a complaint still risks retaliatory eviction or an arbitrary rent increase.

So long as fossilized eviction statutes, as those of Oregon and New Hampshire, provide free access to the courts for the slum landlord but deny meaningful access for the tenant, the public policy intended by the housing codes will continue to be frustrated.

The foundation of the United States judicial system has been that disputes between litigants shall be given a complete and public forum by the adversary method. Eviction statutes of Oregon and New Hampshire are a betrayal of this adversary method, since indigent tenants cannot afford a bond to obtain meaningful access to the courts.

This Court should hold that the financial and procedural requirements of the Oregon statutes violate the Constitution of the United States. The decision of the three-judge federal district court should be reversed.

Respectfully submitted,

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ATTORNEYS for New Hampshire
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APPENDIX

The New Hampshire Revised Statutes Annotated,
Chapter 540, Actions Against Tenants.
(Annotations omitted from this Appendix)

540:1 Tenancies, Nature of. Every tenancy or occupancy shall be deemed to be at will, and the rent payable upon demand, unless a different contract is shown.

540:2 Termination of Tenancy. Any lessor or owner of lands or tenements may at any time determine any lease at will or tenancy at sufferance, by giving to the tenant or occupant a notice in writing to quit the same at a day named therein.

540:3 Notice to Quit. If a tenant or occupant neglects or refuses to pay rent due and in arrears, upon demand, seven days' notice shall be sufficient. If the rent is payable more frequently than once in three months, whether such rent is due or not, a notice equal to the rent period shall be sufficient, and three months' notice shall be sufficient in all cases.

540:4 Demand. Such demand shall be sufficient if made upon the tenant or occupant at any time after the rent becomes due and prior to the service of such notice to quit.

540:5 Service of Demand and Notice to Quit. Such notice of a demand and such notice to quit may be served by any person by a true and attested copy of the demand or notice to quit, the return of such service to be shown by an affidavit on the back thereof, and each may be served upon the tenant or left at his last and usual place of abode.

540:6 Violation of Lease. If the lessee violates the condition of a written lease notice to quit at the end of seven days shall be sufficient and equivalent to an entry of condition broken.

540:7 Demand of Rent. Where, to constitute a forfeiture for a violation of the condition of a written lease, a demand of rent is required such demand may be made as provided in section 5.

540:8 – Time of. Such demand may be made when the rent is due or while it is in arrears, but the lessor shall not demand a greater sum than the whole rent in arrears when demand is made.

540:9 Payment After Notice. No forfeiture shall be incurred for nonpayment of rent if the lessee before the expiration of the notice shall pay or tender to the lessor all rent in arrears, together with five dollars as damages and costs occasioned by his default.

540:10 Holding Over. If a lessee holds over after the expiration of a definite written lease, or a mortgagor in possession or one claiming by or under him refuses to surrender the premises after the foreclosure of the mortgage, seven days' notice shall be sufficient.

540:11 Termination by Lessee. A lessee may terminate his lease by notice in writing, in the same manner as the lessor, and the notice shall have the same effect for all purposes as a notice by the lessor to the lessee.

540:12 Possessory Action. The owner, lessor, or purchaser at a mortgage foreclosure sale of any tenement or real estate may recover possession thereof from a lessee, occupant, mortgagor, or other person in possession, holding it without right, after notice in writing to quit the same as herein prescribed.

540:13 (supp.) Writ; Service. A writ of summons may be issued, returnable before a municipal court, setting forth in substance that the plaintiff is entitled to the possession of the demanded premises, and that the defendant is in possession thereof without right, after notice in writing to quit the same, which writ shall be served seven days before the return day thereof.

540:14 (supp.) Judgment. If the defendant makes default, or if on trial it is considered by the court that the plaintiff has sustained his complaint, judgment shall be rendered that the plaintiff recover possession of the demanded premises and costs, and a writ of possession shall issue.

540:15 Neglect to Enter, etc. If the plaintiff neglects to enter his action, or fails to support it, judgment shall be rendered for the defendant for his costs.

540:16 General Issue. Under the general issue, the defendant shall not offer evidence which may bring the title to the demanded premises in question.

540:17 (supp.) Plea of Title, Recognizance. If the defendant shall plead a plea which may bring in question the title to the demanded premises he shall forthwith recognize to the plaintiff, with sufficient sureties, in such

sum as the court shall order, to enter his action in the superior court for the county at the next return day, and to prosecute his action in said court, and to pay all rent then due or which shall become due pending the action, and the damages and costs which may be awarded against him.

540:18 (supp.) Effect of Plea, etc. After the filing of such plea and the entry of such recognizance no further proceedings shall be had before the municipal court, but the action may be entered and prosecuted in the superior court in the same manner as if it were originally begun there.

540:19 Neglect to Recognize. If the defendant neglects or refuses to recognize, judgment shall be rendered against him in the same manner as if he had refused to make answer to the suit.

540:20 (supp.) Appeal. A party aggrieved by the judgment of a municipal court upon issue joined in such case may, within three days after the rendition of the judgment, appeal therefrom.

540:21 – Procedure on. The party appealing shall produce certified copies of the whole case at the court appealed to at the next return day, and either party may there offer evidence as if the cause had been originally begun therein.

540:22 Neglect to Enter Appeal. If the appellant neglects to enter his appeal or to produce such copies the court, on complaint of the appellee, shall affirm the former judgment, with additional damages and costs.

540:23 Plaintiff's Damages. If a defendant files a plea of title or appeals, and the plaintiff recovers judgment against him, the court shall cause his damages, exemplary or otherwise, including a just compensation for the use and detention of the property and for any injury thereto, to be assessed by the jury who try the issue, or otherwise, and may issue execution therefor, or the same may be recovered on the recognizance taken as before provided.

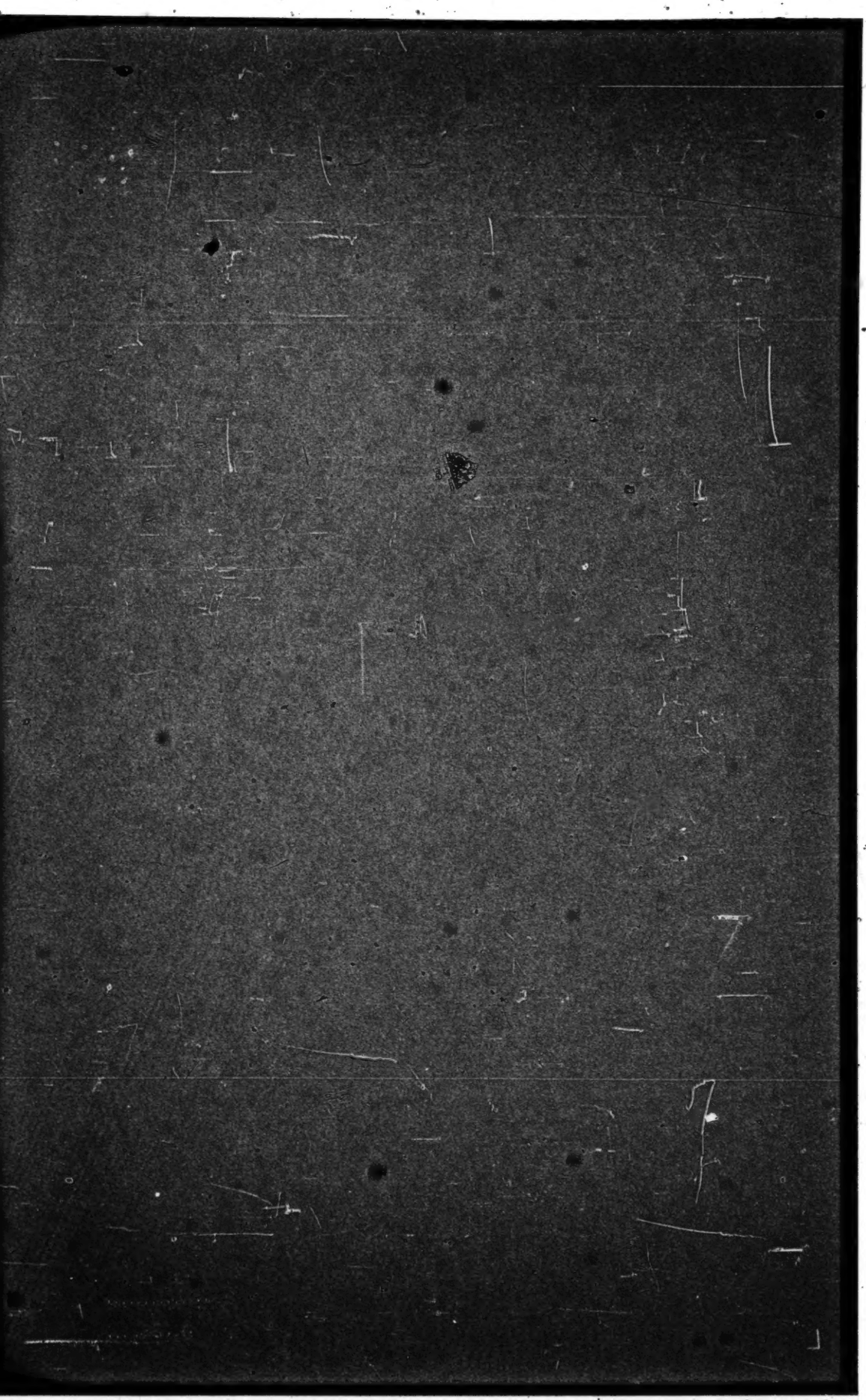
540:24 (supp.) Recognizance, by Plaintiff. The plaintiff, before his appeal is allowed, shall recognize to the defendant, with sufficient sureties, in such sum as the court may order, to enter and prosecute his appeal, and to pay such costs as may be awarded against him.

540:25 (supp.) Recognizance, by Defendant. The defendant, before his appeal is allowed, shall recognize to the plaintiff, with sufficient sureties, in such sum as the court may order, to enter and prosecute his appeal, and

to pay all rent then due or which may become due pending the suit, and such damages and costs as may be awarded against him.

540:26 Other Remedies. Nothing in this chapter shall be construed to prevent a landlord from pursuing his legal remedy at common law.

540:27 Landlord's Grantee. Whenever the estate occupied by a tenant at will or sufferance is conveyed by the landlord his grantee shall have the rights and remedies which the grantor would have had, under the provisions of this chapter, if the estate had not been conveyed.



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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970

Misc. No. ~~6158~~ 70-5045

DONALD and EDNA LINDSEY, and
ALL Other Persons Similarly Situated,

Appellants,

vs.

DOROTHEA M. NORMET, HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

On Appeal From a Judgment of the
U. S. District Court of Oregon
and Numbered Therein as Civ. No. 70-8

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF UNDER RULE 42 IN LINDSEY V. NORMET, MISC. NO. 6158, AND AMICUS CURIAE BRIEF

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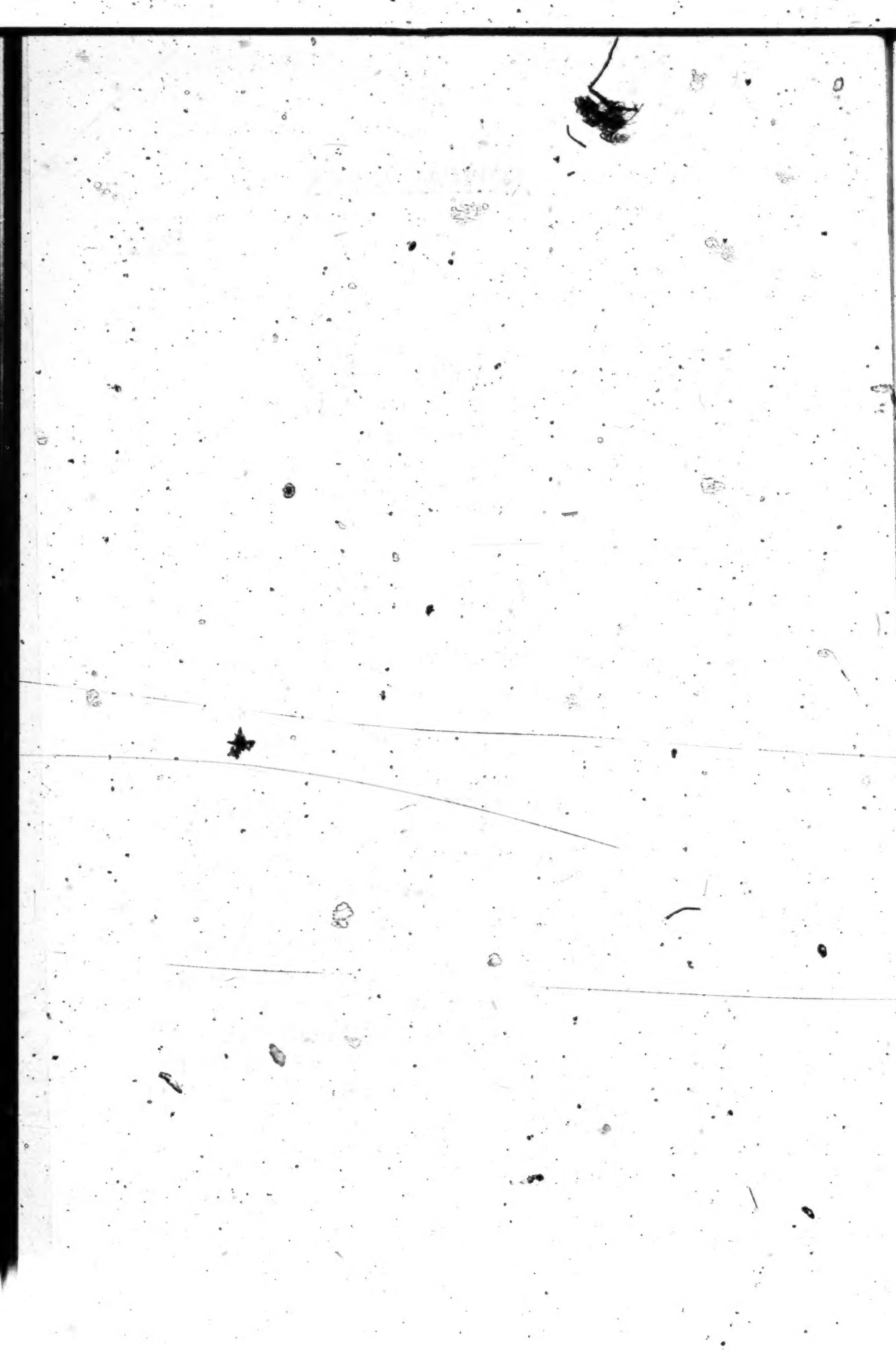

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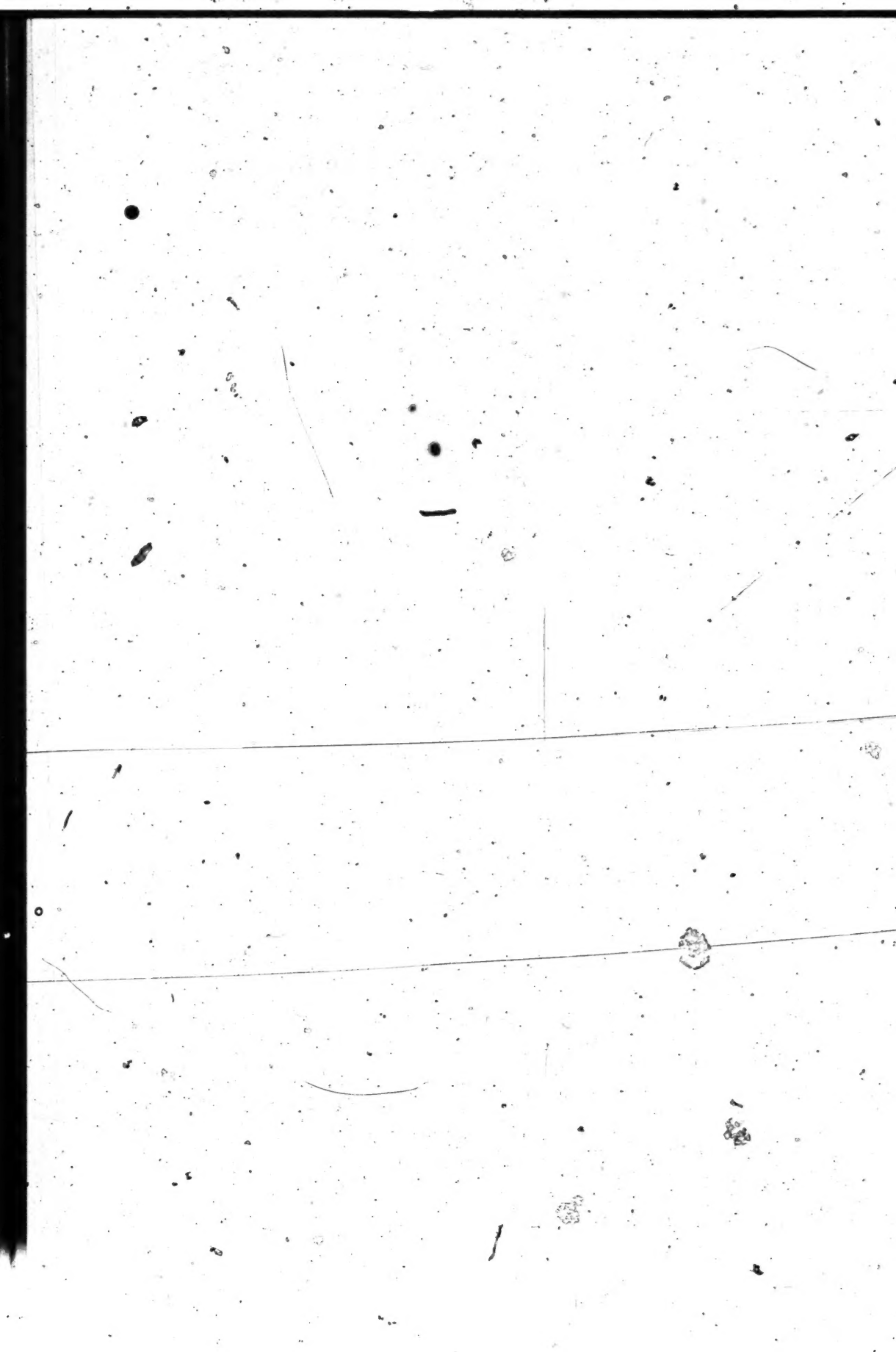

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IN THE
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October Term, 1970

Misc. No. 6158

DONALD and EDNA LINDSEY, and
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Appellants,

vs.

DOROTHEA M. NORMET, HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF UNDER RULE 42 IN CASE OF LINDSEY V. NORMET, MISC. NO. 6158; OCTOBER 1970 TERM

Pursuant to Rule 42 of the United States Supreme Court, the Western Center on Law and Poverty respectfully requests this Court to grant leave to file an amicus curiae brief herein on behalf of Appellants.

The Western Center on Law and Poverty is funded by the Office of Economic Opportunity to provide research, appellate and back-up services to legal services programs in Southern California. Because of its purpose, the Western Center has done extensive research on, and has extensive practical experience with, many of the issues presented by this case. The Western Center also represents many persons who are affected by California statutes which are similar to certain Oregon statutes under consideration herein. Thus, the Western Center would be remiss in its duty to its clients if it did not seek to present this amicus brief.

The amicus brief presented herewith consists of two parts. The first part analyzes the constitutionality of those Oregon statutes under consideration herein which are similar to California statutes. These are, specifically, Oreg. Rev. Stat. §105. 135 and to a lesser extent, Oreg. Rev. Stat. §§105. 125 and 105. 140. While the ruling of this Court in this case will not directly determine the propriety of the analogous California statutes, the ruling is likely to have substantial impact on future litigation concerning such statutes. This is particularly so in that this Court has not previously decided, specifically, the constitutionality of any summary eviction procedures. Further, inasmuch as California is the nation's most populous jurisdiction, its courts have had occasion to pass on many aspects (including constitutional aspects) of landlord-tenant relations. Mr. Justice Harlan, concurring in the dismissal of writ of certiorari as

improvidently granted in Triangle Improvement Council v. Ritchie (on May 17, 1971, Docket No. 712 of October, 1970 term), 39 Law Week 4596, observed as follows:

> "To render a determination upon such a wide-ranging issue we should, at a minimum, have the benefit of the thinking of the lower federal courts on this problem, as well as some knowledge of the responses of the various affected agencies to this new statute. Yet we are entirely without these essential aids." (39 Law Week at 4597.)

The thinking of the California courts on some of the issues presented (see, for example, Mendoza v. Small Claims Court (1958), 49 Cal. 2d 668, 321 P. 2d 9, discussed infra) provides an aid which is analogous to those referred to by Mr. Justice Harlan. This is particularly so in that California courts as State courts, have plenary jurisdiction over all aspects of landlord-tenant law, not just the constitutional aspects, and thus are in a good position to be familiar with the various problems involved and their interrelation. This amicus, with a day to day familiarity with California law, is in a much better position to marshal the relevant California decisions to assist this Court than are attorneys practicing in Oregon. Thus, the brief submitted herewith will supplement, not merely duplicate, those submitted by the parties.

The second part of the amicus brief submitted herewith will acquaint the Court with relevant provisions of California law. If the Court in ruling on the merits of this case is aware of similar laws in other jurisdictions, it will be better able to assess and control the consequences of its decision in this case and thus avoid framing the decision either more broadly or more narrowly than intended. This amicus, because of its familiarity with California law, is able to provide a succinct summary of such relevant California law.

This amicus has contacted respondents herein setting forth the reasons why this amicus wishes to file this brief. Respondent Beers has given his written consent to the filing of this brief. However, respondent Normet has withheld consent, thus necessitating that this motion be submitted.

Respectfully submitted,

PAUL L. McKASKLE

IN THE
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October Term, 1970

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ALL Other Persons Similarly Situated,

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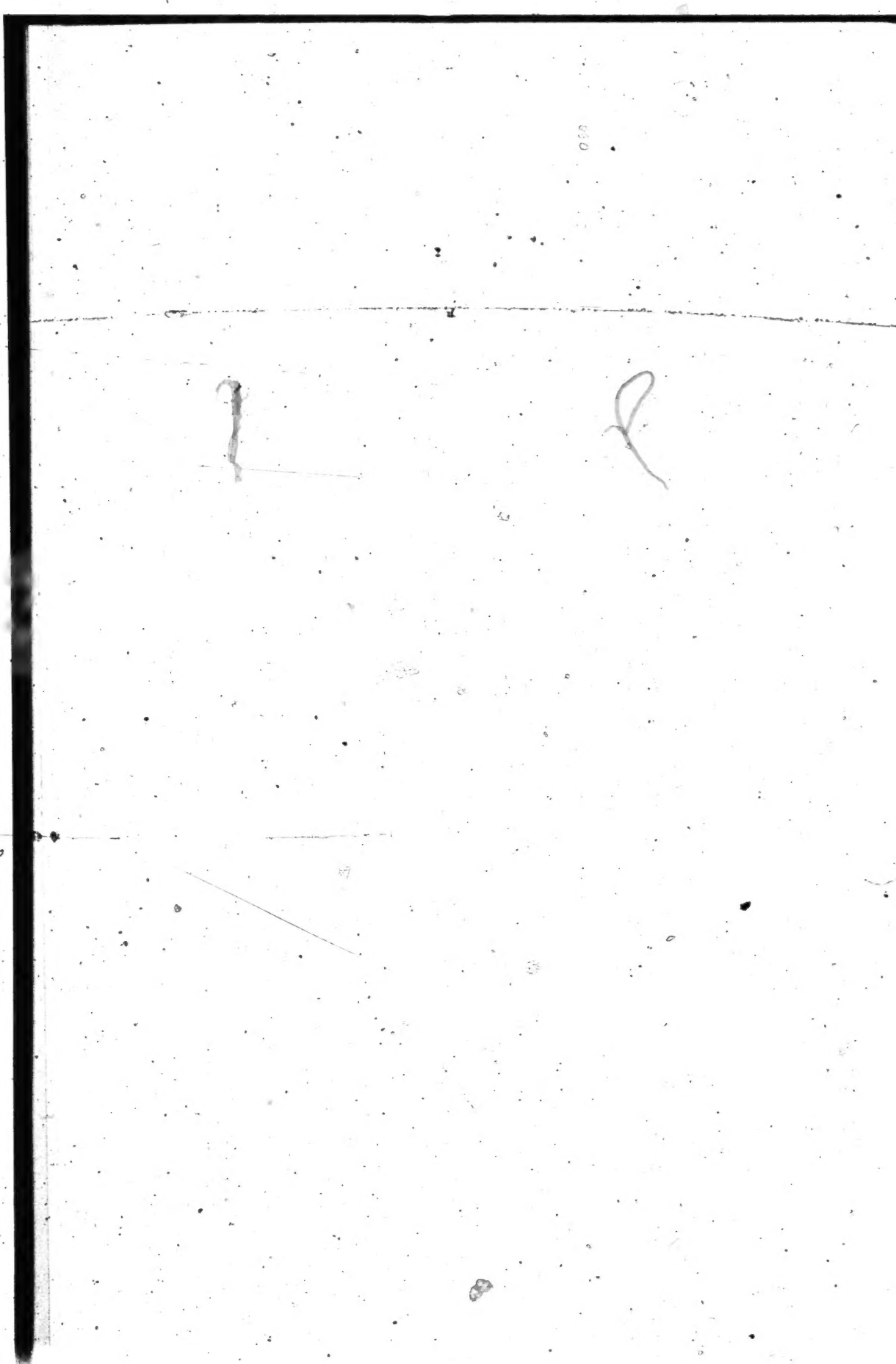
Appellees.

AMICUS CURIAE BRIEF

Amicus, as noted in its motion for leave to file this brief herein, wishes to discuss two major points involved in this case.

First, it supports the appellants' position that the Oregon eviction law is unconstitutional in that it provides inadequate time to prepare for trial. A person may be required to litigate his right to possession to specified property with as little as two days' notice from pendency of action to trial resulting in a final judgment. (See Oreg.



Rev. Stat. §105.135.) The problem is compounded by the inadequate nature of the complaint -- constituting little more than notice that an action is pending (see Oreg. Rev. Stat. §105.125) and the severe limitations imposed on continuances (see Oreg. Rev. Stat. §105.140). For the reasons detailed in the brief herein, the amount of time permitted a tenant to seek counsel and prepare for trial is simply not sufficient to allow for preparation of an adequate defense on the merits.

Second, amicus wishes to provide a brief summary of California eviction procedure. The decision in this case is likely to have impact on eviction procedures in most states (including California). A summary of relevant California law may aid the Court in gauging the impact of its decision, so that it is neither unduly broad or narrow. The inclusion herein of this summary is not, however, intended to suggest that the Court rule directly on any aspect of California law.

I

THE OREGON EVICTION STATUTES PERTAINING TO NOTICE OF TRIAL AND TIME TO PREPARE FOR TRIAL ARE UNCONSTITUTIONAL.

A. PRELIMINARY COMMENT

The three-judge court in Lindsey v. Normet (D. C. Oreg. 1970) Civ. No. 70-8 ruled on five challenges to the Oregon eviction statutes.[1] These were (1) inadequate notice, (2) unreasonably short time for trial, (3) cash security required to obtain a continuance, (4) failure to allow defenses in an eviction action which are allowed in other actions and (5) bond requirements pending appeal.[2] (See Mimeograph Opinion -- Appendix A of the Jurisdictional Statement herein -- pp. 3-7.) This amicus is particularly concerned with the second of these problems -- the provision of an unreasonably short time for trial -- because of the existence of a similar problem in

1 Eviction statutes are referred to by various names in various states. In Oregon, the term F. E. D. (forcible entry and detainer) is used. In California, the term "unlawful detainer" is used. For clarity, the generic term eviction will be used herein.

2 The opinion (Mimeograph, page 7) also refers to three other problems but does not state what they are.

California.[3] However, the analysis herein presented will comment to some degree on the problems of inadequate notice and to a lesser degree with cash security to obtain a continuance and the failure to allow defenses allowed in non-possessary actions -- all of which bear on the adequacy of the time allowed for a trial.[4]

The Oregon eviction statutes which regulate the setting of trials are Oreg. Rev. Stat. §§105.135 and 105.140[5] which provide:

> "105.135. Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

---

3 Calif. Code Civ. Proc. §1166 provides for three days within which to answer a summons or complaint in eviction cases.

4 The problem of requiring a bond for appeal will not be discussed herein because there is no analogous provision in California, and amicus cannot contribute any meaningful additional analysis. The bond requirement would, however, appear on its face to pose serious constitutional problems.

5 The text of these and other relevant Oregon statutes are set out as Appendix D of the Jurisdictional statement in this action.

"105.140. Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant."

Thus, a tenant against whom a landlord wishes to proceed must be prepared for, and actually commence trial, in as short a time as two days after receiving notice that a complaint has been filed.

The three-judge court, in its opinion (Mimeograph Opinion -- Appendix A to the Jurisdictional Statement at p. 5) held that:

". . . a tenant knows in most cases whether or not he has paid his rent, and, if not, why not. The tenant would not be any wiser if the law were to be rewritten to give him ten days' notice. We find nothing unconstitutional in the statutory time element."

Amicus submits that the determination of the court below is erroneous. The conclusion that the "statutory time element" is not unconstitutional ignores the principles of procedural due process which have been set out repeatedly by the Supreme Court. The reason for the conclusion -- that the tenant

ordinarily knows whether rent has been paid -- ignores the salient issue, which is that the tenant must be prepared to disprove the landlord's allegations at a trial, and that numerous factual problems exist in even an "ordinary" eviction case.

Moreover, the requirement that a trial be held within as little as two days from service applies where the grounds for eviction are, for example, that the tenant is "holding contrary to any condition or covenant of the lease . . . ." (Oreg. Rev. Stat. §105.115[2]), grounds which clearly involve issues and matters of proof more difficult than simply whether or not rent has been paid.[6]

Indeed, the decision below appears to suggest that the filing of an eviction action is evidence that the tenant is wrong, and that therefore justice is served by allowing the landlord to evict as rapidly as possible. This would be, in essence, a predermination of the case before trial.

---

6 Other grounds for eviction not involving the question of payment of rent are holding over by the tenant after the lease has expired, without any written lease, or after a notice to quit. (Oreg. Rev. Stat. §105.115[2].)

B. THE REQUIREMENT THAT A DEFENDANT IN AN EVICTION PROCEEDING GO TO TRIAL WITHIN TWO TO FOUR DAYS AFTER SERVICE OF THE COMPLAINT DOES NOT GIVE SUCH DEFENDANT A REASONABLE OPPORTUNITY TO PREPARE A DEFENSE AND THEREFORE DENIES HIM DUE PROCESS OF LAW.

1. A Defendant in an Eviction Proceeding May Not Be Deprived of His Possessory Interest Unless He Is Afforded Procedural Due Process.

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law. The right of a tenant to possession of property has been held to be a right protected by the due process clause. (Mendoza v. Small Claims Court [1958], 49 Cal. 2d 668, 672-73, 321 P. 2d 9; Mihans v. Municipal Court [1970], 7 Cal. App. 3d 479, 484-85, 87 Cal. Rptr. 17. See Sniadach v. Family Finance Corp. [1967], 395 U. S. 337; Lawson v. Featherston [1970], 44 Wisc. 2d 712, 172 N. W. 2d 20.)

2. Procedural Due Process Requires Notice Reasonably Calculated, Under All the Circumstances, to Apprise Interested Parties of the Action and Afford Them an Opportunity to Present Their Objections.

The very foundation of procedural due process is reasonable notice of a pending action. This principle has been reiterated in numerous court decisions concerning the requisites of procedural due process. In the leading case, Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, the United States Supreme Court outlined with great clarity the fundamental requirements of procedural due process..

> "An elementary and fundamental requirement of due process in any proceeding which is to be afforded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . ." (Id., at p. 314 [citations

omitted].)[7]

More recently in the case of In re Gault (1967), 387 U.S. 1, the Supreme Court once more emphasized that mere notice is insufficient unless it affords the defendant time to prepare.

> "Notice to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded . . . ." (Id., at p. 33.)

Even though dissenting from certain portions of the Gault decision, Justice Harlan agreed with the principle set out in the foregoing quote:

> "The Court has consistently made it plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the hearings. See, e.g., Roller v. Holly . . . ." (387 U.S. at p. 73 [Harlan, J. concurring and dissenting].)

The decided cases make clear that notice is not reasonably calculated to afford the defendant the required opportunity as a matter of law where it is likely in a significant portion of cases

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7 Accord: Armstrong v. Manzo (1965), 380 U.S. 545, 549-50; Mendoza v. Small Claims Court, supra, 49 Cal.2d 668, 672-73; Estate of Reed (1968), 259 Cal.App.2d 14, 20-22, 66 Cal.Rptr. 193; Mihans v. Municipal Court, supra, 7 Cal.App.3d 479, 484-85.

that the defendant will be unable to respond in the time allotted. (Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. 306.) That is, notice is not adequate even though some defendants in some circumstances may be able to comply. What is required to meet the test established in Mullane is notice reasonably calculated, under all the circumstances, to afford an opportunity to respond. This principle is illustrated by another of the leading Supreme Court cases, Roller v. Holly (1900), 176 U.S. 398.[8] In Roller, a summons issued in Texas allowing but five days to appear was served on a party located in Virginia. (176 U.S. at pp. 401-402.) The court held that the defendant was denied due process of law because the notice did not allow sufficient time to make an adequate appearance. (176 U.S. at pp. 408-13.) The Court reasoned:

> "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of law to which no citation of authority would give additional weight; but upon the question of the length of such notice, there is a singular dearth of judicial decision.

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8 Roller was cited with approval in In re Gault, supra, 387 U.S. 1, 78 (Harlan, J. concurring and dissenting); Armstrong v. Manzo, supra, 380 U.S. 545, 550; Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. 306, 314; Roberts v. Jacob (1908), 154 Cal. 307, 309, 97 Pac. 671, affirmed 223 U.S. 261.

> It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose . . . . What shall be deemed reasonable notice admits of considerable doubt. In the case of a witness subpoena, the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to court with the utmost dispatch, or at least present himself upon the return day of the writ. An ordinary summons, however, to answer the suit of a private individual, contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defense."
> (176 U.S. at p. 409 [citations omitted].)

It is important to note that the Court did not premise its finding of the inadequacy of the notice on the defendant's actual inability to appear. Rather, the Court relied on contingencies which might in some circumstances make it impossible for a given defendant to appear.

> "In the case under consideration, it is admitted that the defendant was served with notice on December 30, 1890, at Harrisonburg, Rockingham county, Virginia, to appear on January 5, 1891, at Groesbeck, Limestone county, Texas; that it

> would have required four days of constant traveling to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit." (176 U. S. at pp. 408-09.)

In addition the Court rejected the argument that the default of the defendant would in all likelihood be set aside under the circumstances.

> "Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion -- a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest on a basis more substantial than favor or discretion." (176 U. S. at pp. 408-09.)

In Hyman v. Ross (1948), 84 N. Y. Supp. 2d 102, a New York procedure providing six days to respond to a mechanic's lien foreclosure was held to provide insufficient notice to a defendant served in Illinois.[9] The court

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9 Accord: Robins v. Robert Lawrence Electronics (1948), 84 N. Y. Supp. 2d 99; see Finn v. Chase National Bank (1941), 176 Misc. 127, 26 N. Y. S. 2d 771.

took specific notice of the vast improvement in technology and transportation since the decision in Roller -- Illinois was by 1948 but an overnight train ride or even a shorter plane trip from New York and telephone communication was virtually instantaneous -- but still held six days to answer to be constitutionally inadequate.

Similarly, in McCullough v. Terzian (1970), 2 Cal. 3d 647, 653-55, 87 Cal. Rptr. 195, 470 P. 2d 4, the California Supreme Court held that three days' notice of an informal hearing to contest the termination of welfare benefits was inadequate and denied recipients procedural due process. It should be noted that an informal welfare hearing may involve even less preparation than a formal trial in even a simple eviction action -- particularly in view of liberal evidentiary standards in administrative procedures and the lack of a need to draft and type a formal responsive pleading such as an answer.

Thus, the rules laid down in Roller and Mullane were that notice is constitutionally inadequate if it is not reasonably calculated to provide a defendant sufficient time in most circumstances to take appropriate steps to prepare and present his defenses. It is not enough that it would not be impossible, provided no difficulties were encountered, for some defendants in some circumstances to appear.

3. The Two to Four Days Permitted Defendants By Oregon Law to Prepare For Trial in Eviction Proceedings Does Not Afford a Reasonable Opportunity to Contest the Issues Presented.

At the outset it must be observed that the Oregon statute governing the setting of eviction actions permits a landlord to cause the trial to be held two days after service of the complaint by simply avoiding service on an earlier date. Thus, no tenant in Oregon has a statutory right to more than two days' notice.[10] Two days' notice or (for that matter, even four days' notice) is not, in view of the principles set forth above, notice reasonably calculated to afford eviction case defendants a

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10 While a landlord may choose to serve the complaint so as to allow four days to prepare, there is no compulsion requiring him to do so. Similarily, under Oreg. Rev. Stat. §105.140, the court has discretion to grant an additional two days' continuance. Even so, as a matter of right, the tenant has no more than two days to appear. Roller v. Holly, supra, 176 U.S. at pp. 408-09 makes it clear that due process is measured by what a citizen has a right to receive, not what he may receive by favor or discretion. Thus, the Oregon procedure must be tested as to its constitutionality by the two-day period of notice permitted by right.

realistic opportunity to defend an action.

(a) The Tenant Is Not Afforded Adequate Opportunity to Attempt to Locate Counsel to Help in the Defense of the Action.

The first problem faced by a defendant in an Oregon eviction action following service of the complaint is to attempt to locate an attorney. For the unsophisticated tenant who may never have required legal services, this may prove to be a time consuming process even if employment or other daily obligations do not prevent him from commencing the search immediately.[11] Even assuming a defendant can locate an attorney immediately, he then must secure an appointment. Where the attorney contacted has a busy calendar, particularly if he is employed by a legal services program, it may well be impossible for the attorney to schedule an appointment within the limited time permitted by

11 Compare Roller v. Holly, supra, 176 U. S. 398, 409: "an ordinary summons . . . to answer suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel . . . ."

Oreg. Rev. Stat. §105.135.[12] Further, the attorney may be otherwise engaged on the time and date (by then, perhaps less than two days hence) set for trial. Assuming that the defendant locates and is interviewed by an available attorney before the trial date, the attorney must obtain the necessary factual information to permit an evaluation of the case. His evaluation is severely impeded by the extremely cryptic material allegations in the landlord's complaint.[13] If there is a meritorious case he

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12 It should be pointed out that a reasonable and prudent man of limited means faced with a trial in two to four days might well conclude that the chances of finding an attorney are so slight that he should devote the limited time available to seeking new quarters for his family even though he has a defense to the action. Such individuals would not, of course, come to the attention of an attorney.

13 See Oreg. Rev. Stat. §105.125. A complaint is sufficient if it alleges:

"(1) A description of the premises with convenient certainty;

"(2) That the defendant is in possession of the premises;

"(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

"(4) That the plaintiff is entitled to the possession of the premises."

(Cont'd)

must then draft and have typed a responsive pleading and collect the relevant evidence.

(b) The Tenant Is Not Afforded Adequate Opportunity to Prepare a Defense to Even the Prima Facie Showing Required by the Landlord.

The court below appeared to assume that the only relevant information that a tenant needs to go to trial is "knowledge" as to whether his rent was paid. However, Oreg. Rev. Stat. §105.125(3) requires that the landlord allege, with respect to the grounds for eviction, only that the tenant "entered upon the premises with force

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13 (Continued)

While a complaint which, in essence, gives only notice that an eviction action is pending might not be unconstitutional in situations where ample time to investigate the case (including by way of discovery) is afforded, the constitutionality of Oreg. Rev. Stat. §105.125 is questionable in the context of Oregon eviction law procedures. The Mullane case, supra, is clear that: "The notice must be of such a nature as reasonably to convey the required information . . ." (339 U.S. at 314) and in view of the short time limits involved herein, pure 'notice pleading' is obviously not of such a nature.

or unlawfully holds the premises with force;" thus, the tenant who "knows" that he has paid the rent must determine in what other manner, if any, he is unlawfully holding the premises (as defined in Oreg. Rev. Stat. §105.115). Other fact issues which may be involved under Oreg. Rev. Stat. §105.115 include (1) Is there a lease? (2) If there is a lease, when does the lease expire? (3) Is a notice to quit required, and has it been given? (4) Is the tenant holding contrary to a condition or covenant? (5) Is the plaintiff the person entitled to possession of the property pursuant to such a summary remedy?[14]

Assuming, however, that the tenant somehow knows the landlord's claim to right to possession is nonpayment of rent, even this one issue may involve considerable preparation. For example, if the rent was paid by money order or third party check and no receipt obtained, it would usually take several days to obtain the cancelled money order or

14 See, for example, California cases such as Francis v. West Virginia Oil Co. (1917), 174 Cal. 168, 162 Pac. 394; Fredericksen v. McCosker (1956), 143 Cal. App. 2d 114, 299 P. 2d 908, where attempts were made to use eviction actions to obtain the results of a quiet title action.

check from the bank or third party.[15] While the tenant can testify that he paid the rent, physical evidence of a cancelled check or money order is immensely more persuasive. The time allowed a tenant before trial virtually precludes the possibility that the tenant (or his lawyer) can obtain such evidence. As another example, the tenant may know of witnesses who can corroborate his testimony as to payment of rent (or, in eviction cases founded upon Oreg. Rev. Stat. §105.115(2), the lack of service of a notice to quit, the terms of an oral lease, whether a covenant has in fact been breached, or other relevant facts). In the time permitted for trial, it is likely to be difficult to locate and interview these witnesses, let alone obtain and serve a subpoena to appear if a witness will not (or cannot, because of employment, illness, etc.) appear voluntarily. Indeed, because of the uninformative allegations contained in the complaint, it may only be at trial after the plaintiff presents his prima facie case that the tenant learns that the action is based on, say, alleged breach of a covenant or condition. Under such circumstances, the tenant would literally have no time at all to locate and subpoena witnesses or assemble other relevant evidence.

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15 The experience of this amicus is that many of its clients, poor people, pay rent by money order or third party checks (the latter usually being welfare or social security checks). This is because their assets are too meager to justify maintaining a bank account.

Since, in essence, the Oregon statutes prevent a tenant from preparing an effective defense on even the prima facie elements of an eviction action, it constitutes a denial of due process.[16]

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16 The immediate effect of the judgment against a tenant in an eviction action is to dispossess him of the property he is occupying. As noted at the outset, the right of possession alone is protected by due process. However, the judgment may have substantial collateral effects as well. California experience is instructive on this point. For instance, the judgment may have res judicata effects on issues litigated in the action. See, for instance, Turem v. Texaco, Inc. (1965), 236 Cal. App. 2d 758, 46 Cal. Rptr. 389 and Seidell v. Anglo-California Trust Co. (1942), 55 Cal. App. 2d 913, 132 P. 2d 12; where such a doctrine was applied. Another line of California cases holds more or less to the contrary. See, e. g., Cheney v. Trauzettel (1937), 9 Cal. 2d 158, 69 P. 2d 832; Haase v. Lamia (1964), 229 Cal. App. 2d 654, 40 Cal. Rptr. 518. Oregon law may be silent on this point, but the California cases indicate the possibility that an eviction judgment may ultimately be used as a bar in subsequent litigation, involving more substantial issues, such as title to property or other major issues. Given such a possibility, the due process issues involved in an eviction action are much greater than appear at first glance, and only emphasize why a tenant or his attorney must have adequate time to fairly meet the issues involved.

Finally, as noted before, a continuance granted only as a matter of discretion is not sufficient to provide due process. But, Oreg. Rev. Stat. §105.140, the continuance statute, suffers an even graver defect. No continuance even as a matter of discretion, may be granted for more than two days unless a bond is posted. A tenant without ready cash (which may well be likely if the tenant already has paid his rent, and simply wants a chance to prove it) or, without the ability to obtain, immediately, sufficient sureties is, thus, denied any chance whatsoever to obtain adequate time to defend the eviction action. This, in itself constitutes a denial of access to the courts, and hence, a denial of due process as well as equal protection. (See Griffin v. Illinois (1956), 351 U.S. 12, reh. den. 351 U.S. 958; Smith v. Bennett (1961), 365 U.S. 708; Williams v. Oklahoma City (1969), 395 U.S. 458; Lee v. Habib (D.C. Ct. App. 1970), 424 F.2d 891, 898-902.)

(c) The Tenant Is Not Afforded Adequate Opportunity to Prepare a Defense Which as a Matter of Constitutional Law He Is Entitled to Assert.

If the sole or primary purpose of an eviction is racial discrimination, the tenant should be permitted to defend against such an eviction. See Shelley v. Kraemer (1948),

334 U.S. 1, in which this Court held that racially restrictive covenants could not be enforced in the courts. Similarly, in California, Abstract Investment Co. v. Hutchinson (1962), 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, held that such a defense is constitutionally required to be permitted. Another defense which may be required to be allowed as a matter of constitutional law is existence of retaliatory motive in the eviction. See the suggestion to this effect in Edwards v. Habib (1968), 397 F. 2d 687, 130 App. D. C. 126, cert. denied (1969), 393 U. S. 1016. (See also Schweiger v. Superior Court (1970), 3 Cal. 3d 507, 90 Cal. Rptr. 729, 476 P. 2d 97.)

Preparation of a defense based on racial (or other constitutionally prohibited) discrimination typically involves substantial preparation since much of the proof may have to be circumstantial. It is unlikely that the landlord will admit his motive in court. The tenant would be required to establish that despite prima facie compliance with Oregon statutory requirements for possession, the landlord is not entitled to possession because of his motives. The lack of opportunity for discovery would require the tenant to prepare on every major issue involved in such a defense, since there would be no way of narrowing the issues to those which are genuinely in dispute. For example, this may even require subpoenaing witnesses to authenticate written communications of the plaintiff which might help establish the discriminatory motive, when, through discovery, the authenticity of such documents might be admitted.

The Oregon eviction procedure places a herculean task on a tenant who believes he is being discriminated against. With a right to no more than two days to prepare a defense, in most instances even a landlord motivated by a discriminatory motive will prevail. This reason alone is sufficient to demonstrate that the time permitted to prepare for trial under the Oregon eviction statute is a denial of due process.

(d) The Tenant Is Not Afforded Adequate Opportunity to Raise Affirmative Defenses Which May Ultimately Be Accepted as a Matter of State Law.

While various states have adopted a summary procedure to facilitate evictions, the law dealing with such procedures has rarely been static and inflexible. For example, California has long had a summary procedure for evictions. Early California law (see, e.g., Arnold v. Krigbaum (1915), 169 Cal. 143, 146 Pac. 423) was quite rigid, apparently admitting of no affirmative defenses. This law has been subject to continuous modifications. Thus, in 1924, the case of Schubert v. Lowe, 193 Cal. 291, 223 Pac. 550, allowed equitable defenses to be raised. In 1962, Abstract Investment Co. v. Hutchinson, supra, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, permitted defenses based

on racial discrimination. In 1970, Schweiger v. Superior Court, supra, 3 Cal. 3d 507, permitted defenses based on retaliatory motive. Further, if other state decisions are any measure, other defenses may be eventually permitted in California. See, for instance, Javins v. First National Realty Corp. (D. C. Ct. App. 1970), 428 F. 2d 1071, cert. denied (1970), 400 U. S. 925; Lemle v. Breeden (1969), 51 Haw. 426, 462 P. 2d 470; and Reste Realty Corp. v. Cooper (1969), 53 N. J. 444, 251 A. 2d 268 (habitability as a defense); Longenecker v. Hardin (Ill. App. Ct. 1970), ___ Ill. 2d ___, 264 N. E. 2d 878 and Brown v. Southall Realty Corp. (D. C. Ct. App. 1969), 237 A. 2d 834, cf. Shephard v. Lerner (1960), 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (illegality of lease as a defense). This amicus at present is representing client in . . . . . cases on appeal in California state courts involving both habitability and illegality.

Amicus does not maintain in connection with this case that all of the defenses outlined are constitutionally required. Rather, this amicus submits that the Oregon procedure, requiring trial on the merits in as short a time as two days is so draconian that a tenant in Oregon would not have a fair opportunity to raise any of these issues so that the Oregon courts can fairly decide if any of the defenses should be permitted. As the Oregon statute now reads, any case attempting to present any one of these issues is likely to be rendered moot, or be so badly presented as to its factual basis, because of insufficient time to prepare,

as to render a considered decision on the merits unlikely. Thus, in this respect, as well as the other respects outlined above, the Oregon eviction procedure constitutes a denial of due process.

C. CONCLUSION

For the numerous reasons outlined above, Oreg. Rev. Stat. §105. 135, especially when construed in light of Oreg. Rev. Stat. §§105. 125 and 105. 140, simply do not give a tenant time to adequately prepare to defend his right to possession of the property (usually his residence) in question. The issues, and the problems of adequate proof, are far more complex even in a prima facie case than the court below has suggested. Only a very resourceful and lucky tenant could possibly be prepared to defend such an action adequately. The fact that some tenants may have no defense does not justify taking away the opportunity to adequate notice and time to prepare for those who may have a defense. To hold to the contrary is to prejudge such cases. Further, it would be contrary to the holdings of the various cases (such as Mullane) discussed at length herein. Therefore, this amicus submits that the Oregon eviction procedures, respecting the amount of time allowed to prepare a defense, and in particular Oreg. Rev. Stat. §105. 135, must be held to be unconstitutional as constituting a denial of due process.

II

CALIFORNIA UNLAWFUL DETAINER STATUTES

California's statutes providing for summary proceedings for a landlord to obtain possession of rented real property (Calif. Code Civ. Proc. §§1161-1179(a)) apply, as do the Oregon statutes, where a tenant continues in possession after a lease has expired (Calif. Code Civ. Proc. §1161, subd. 1; see Oreg. Rev. Stat. §105.115(2)) after failing to pay the rent (Calif. Code Civ. Proc. §1161, subd. 2; see Oreg. Rev. Stat. §105.115 (1)); after failing to perform conditions of the lease (Calif. Code Civ. Proc. §1161, subd. 3; see Oreg. Rev. Stat. §105.115(2)); and after receiving written notice to vacate the premises (Calif. Code Civ. Proc. §1161, subd. 5; see Oreg. Rev. Stat. §105.115(2)). [17]

Where there are no specific grounds to evict a tenant, the tenant is entitled to 30 days' written notice to vacate before the landlord may bring an action in unlawful detainer (Calif. Civ. Code §1946; cf. Oreg. Rev. Stat. §§91.060 - 91.080).

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17 In addition, the unlawful detainer statutes may be used by the purchaser at an execution, mortgage foreclosure, or a trustee's sale to evict the former owner (Calif. Code Civ. Proc. §1161a); and where a tenant sublets contrary to the terms of the lease, or commits acts of waste upon the rented or leased premises (§1161, subd. 4).

The landlord-plaintiff must file a written complaint in which, unlike the Oregon counterpart, the plaintiff may seek recovery both of possession of the premises and of money damages (Calif. Code Civ. Proc. §1166; cf. Oreg. Rev. Stats. §105.145). The summons and complaint, as in Oregon, must be served in the same manner as in any other action (Calif. Code Civ. Proc. §§1167, 415.10, et seq.; see Oreg. Rev. Stats. §105.135). An unlawful detainer complaint (but see Oreg. Rev. Stats. §105.125) must be verified and pleaded with specificity (Calif. Code Civ. Proc. §1166). The complaint must allege compliance with statutory notice requirements, the grounds on which the plaintiff bases his claim of right to possession (see, e.g., Iburg v. Fitch (1881), 57 Cal. 189, 192; Hinman v. Wagnon (1959), 172 Cal. App. 2d 24, 27, 341 P. 2d 749), and that the relationship of landlord and tenant exists (Fredericksen v. McCosker (1956), 143 Cal. App. 2d 114, 116; 299 P. 2d 908), in addition to the allegations required under Oregon law, that is, a description of the property, the defendant's possession of the property, and the plaintiff's right to possession of the property. (See generally, Arnold v. Krigbaum, supra, 169 Cal. 143.) The defendant-tenant must file a written pleading within three calendar days after service of the summons upon him (Calif. Code Civ. Proc. §§12, 1167), while in all other civil proceedings, the defendant is permitted thirty days within which to file a responsive pleading (Calif. Code Civ. Proc. §412.20; cf. Oreg. Rev. Stat. §15.140(2) [10 days]).

The defendant-tenant is permitted to "answer or demur" to the landlord's complaint (Calif. Code Civ. Proc. §1170).[18] Although "answer" usually includes counterclaims and affirmative defenses (Calif. Code Civ. Proc. §437), Code of Civil Procedure §1167 has been construed to prohibit raising cross-complaints or counterclaims (see, e.g., Schubert v. Lowe, supra, 193 Cal. 291, 294-295; and Turem v. Texaco, Inc., supra, 236 Cal. App. 2d 758, 763), or any affirmative defenses other than certain equitable defenses (see generally, Schubert v. Lowe, supra, and Union Oil Co. of Cal. v. Chandler (1970), 4 Cal. App. 3d 716, 721-723, 84 Cal. Rptr. 756), such as racial discrimination (Abstract Investment Co. v. Hutchinson, supra, 204 Cal. App. 2d 242, 248-249), or retaliatory eviction (Schweiger v. Superior Court, supra, 3 Cal. 3d 507, 512-513).[19]

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18 The defendant may also file a motion to quash the summons on grounds of lack of jurisdiction (Calif. Code Civ. Proc. §418.10).

19 Where the basis of the complaint is the tenant's failure to remove after being notified that the plaintiff has obtained title to the property under an execution, mortgage foreclosure, or trustee's sale (see Calif. Code Civ. Proc. §1161a), the tenant is permitted to challenge only the lawfulness of the sale proceedings; he cannot challenge the lawfulness of the proceedings which led to the sale (Cheney v. Trauzettel, supra, 9 Cal. 2d 158, 160). (See ante fn. 16.)

In brief, with certain exceptions, the tenant is limited in his answer to a denial of the relevant allegations in the landlord-plaintiff's complaint.

Unlawful detainer actions are entitled to precedence over all other civil actions (Calif. Code Civ. Proc. §1179a). However, unlike the Oregon statutes which provide for a trial within two to four days after the summons is served (Oreg. Rev. Stat. §105.135), the actual time to trial in California will vary depending upon the number of filings of actions entitled to calendar preference in the particular municipal court judicial district involved, and the extent of pretrial motions and discovery proceedings.

If the landlord prevails at the trial, and has sought restitution of the premises, the court is required to order restitution and, as noted, to award money damages resulting from the unlawful detainer (contrast Oreg. Rev. Stat. §105.155), and may award treble the actual damages (Calif. Code Civ. Proc. §1174) if the withholding is wilful, deliberate and intentional (Whipple v. Haberle (1963), 223 Cal. App. 2d 477, 485, 36 Cal. Rptr. 9).

If the plaintiff-landlord obtains a writ of restitution in the unlawful detainer action, he is entitled to have the premises restored to him by the sheriff or marshal, who serves the writ of restitution. The tenant must vacate the premises within five days after the writ is served (Calif. Code Civ. Proc. §1174). In contrast, in Oregon, the physical eviction is

apparently effected immediately. (See Oreg. Rev. Stat. §105.155.) If the tenant fails to move within five days, the enforcing officer removes the tenant from the premises and the landlord is required to store the tenant's property remaining on the premises for a period of 30 days (Calif. Code Civ. Proc. §1174). During that period, the tenant may redeem his property upon payment of reasonable storage costs (Calif. Code Civ. Proc. §1174).[20]

Respectfully submitted,

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20 The additional requirement in Calif. Code Civ. Proc. §1174, that the tenant pay the amount of the judgment rendered in favor of plaintiff in order to redeem his property was held unconstitutional in Gray v. Whitmore (1971), 17 Cal. App. 3d 1, 27, because, inter alia, the section discriminated against tenant judgment debtors in denying them the opportunity to assert claims of exemption permitted all other classes of judgment debtors. (See Calif. Code Civ. Proc. §§690-690.50.)

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In The

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. 6158~~ 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,

Appellants,

-v-

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON SITTING AS A THREE-JUDGE COURT

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND MFY LEGAL SERVICES, INC.

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MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND NFY LEGAL SERVICES, INC.

Motion for Leave to File a Brief Amici Curiae

Community Action for Legal Services, Inc., and MFY Legal Services, Inc., having sought and failed to obtain the consent of Appellee Dorothea M. Normet to the filing of a brief amici curiae in this court in the case of Lindsey v. Normet et al., No. 6158, October Term 1971, respectfully request that leave be granted for them to file the annexed brief amici curiae in the above mentioned proceeding for the reason that both organizations have a great interest in the decision to be rendered by this Court in Lindsey v. Normet et al., supra, in that they provide free legal services to the poor in the City of New York and represent poor tenants in summary eviction proceedings who necessarily will be affected by the decision to be handed down by this Court.

Community Action for Legal Services, Inc. and MFY Legal Services, Inc. believe that the impact of Lindsey v. Normet et al., upon summary eviction proceedings in New York City will not be presented by the parties and is relevant to the disposition of this case.

WHEREFORE, it is respectfully requested that Community Action for Legal Services, Inc. and MFY Legal Services, Inc. be granted permission to file the annexed brief amici curiae.

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Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON SITTING AS A THREE-JUDGE COURT

Interest of the Amici

Community Action for Legal Services, Inc. (CALS) is the central coordinating corporation for ten other corporations which provide free legal services for the poor in the twenty-six designated poverty areas of New York City. Permission for CALS to practice law pursuant to Section 495(5) of the Judiciary Law was granted by the Appellate Division, First Department, of the Supreme Court of the State of New York on October 10, 1967 and renewed on September 29, 1969.

As the entity charged with the primary responsibility for providing free legal services to the residents of the poor neighborhoods of New York City, CALS, along with its subsidiary corporations represents large numbers of poor tenants in summary eviction proceedings and is familiar with the hardships imposed upon the poor by summary eviction procedures.

MFY Legal Services, Inc. (MFY) is a corporation operating six neighborhood law offices which provide free legal services to the poor on the lower east side and upper west side of Manhattan. MFY, one of the pioneering anti-poverty organizations in New York City, has been providing free legal representation for the poor for approximately six years.

Both CALS and MFY, which operates under the umbrella of CALS supervision and control, have represented numerous tenants in summary eviction proceedings throughout New York City. Because New York City presently faces a housing crisis of enormous proportions which effects the poor more drastically than other elements of the

Interest of the Amici

population, CALS and MFY have an obvious and immediate interest in legal issues affecting the poor tenant.

Although the Oregon forcible entry and unlawful detainer statutes involved in the instant case differ from New York summary proceedings law, their similarity is great enough to raise the same questions with respect to their constitutionality. In Velazquez v. Thompson, Docket No. 35556, presently pending before the United States Court of Appeals for the Second Circuit, litigants represented by CALS have challenged the New York summary proceedings law on substantially the same constitutional grounds relied upon in the instant case. Any decision rendered by this Court in the case presently at bar will necessarily affect the determination in Velazquez v. Thompson, supra, and the status of summary eviction proceedings in New York.

In this brief amici will address themselves to the constitutionality of summary eviction statutes viewed in the context of New York law.

Argument

I.

NEW YORK'S REAL PROPERTY ACTIONS AND PROCEEDINGS LAW DENIES TENANTS ADEQUATE PROCEDURAL PROTECTION AND SAFEGUARDS.

New York's law relating to summary proceedings to recover possession of real property is

similar to Oregon's forcible entry and unlawful detainer statutes in that they both provide tenants inadequate notice of the eviction proceeding, inadequate time in which to prepare for trial, inadequate procedural safeguards at other crucial stages of the litigation and place unnecessarily stringent conditions on access to appellate courts.

In New York the law governing evictions is set forth in Article Seven of the Real Property Action and Proceedings Law (RPAPL). That law provides that a summary proceeding to recover possession of real property may be instituted when the tenant holds over after the expiration of his term or where the tenant has defaulted in the payment of rent after the landlord has made a formal demand for the rent due (RPAPL §711). The proceeding is commenced by the service of a Notice of Petition and Petition by personal service, by substituted service upon a person of suitable age and discretion residing or employed in the subject premises, or by conspicuous service by nailing the Notice of Petition and Petition to a conspicuous part of the premises sought to be recovered. If either of the latter two methods of service is employed the landlord must also mail a copy of the Notice of Petition and Petition to the tenant (RPAPL §735). No attempt need be made to personally serve before conspicuous or substituted service is employed except that in order to support a judgment for rent, due diligence must be made to otherwise serve before conspicuous service may be employed. Joseph E. Seagram & Sons v. Rossi, 45 Misc.2d 427, 257 N.Y.S. 2d 60 (Civ. Ct. N.Y. Co., 1965).

Argument

The tenant's answer to the petition may be made at the time the petition is noticed to be heard or prior to that in certain situations (RPAPL §743). The petition must be noticed to be heard not less than 5 or more than 12 days after service (RPAPL §733). In non-payment proceedings in the city of New York tenants must answer before the clerk within 5 days after service and if the tenant answers, trial must be set for not less than three or more than eight days after joinder of issue (RPAPL §732). However if the tenant fails to answer within five days from the date of service, the judge is directed to render judgment in favor of the landlord (RPAPL §732[3]).

Upon a final judgment for the landlord, after trial on the merits or default by the tenant, the court issues a warrant directing the City Marshal to remove the tenant and return full possession to the landlord. The officer to whom the warrant is directed must give 72 hours notice of the eviction to the tenant (RPAPL §749[2]). The issuance and execution of the warrant may be stayed for limited periods of time, four months outside New York City (RPAPL §753[1]), six months for holdover proceedings in New York City (RPAPL §753 [1]), five days for non-payment proceedings in New York City where there has been a trial or ten days from the date of service where there has been a default by the tenant (RPAPL §732[3] and [4]). In non-payment proceedings when the tenant defaults the landlord is not required to prove a prima facie case before a default judgment is entered in his favor.

Argument

The provisions of Article Seven of the RPAPL have a cumulative effect. Any one provision such as that relating to service of process is compounded by the other provisions providing a short time in which to answer and a short time in which to prepare for trial. Tenants may be evicted from their homes within ten days of alleged service of process without having been afforded a reasonable opportunity to have their defenses heard. This is an extreme hardship in the City of New York where the vacancy rate for apartments is less than one percent.

A. Section 735 of The New York Real Property Actions and Proceedings Law deprives tenants of adequate notice of and opportunity for a hearing prior to eviction.

As stated previously RPAPL §735 provides that service of process in summary proceedings to recover real property may be accomplished in three ways that is by personal, substituted or conspicuous service and there need be no attempt to serve personally or by substituted service before conspicuous service is employed. In fact the most common method of service of process in eviction cases is conspicuous service. For the past few years there has been public recognition of the fact that in New York City there is widespread failure to comply with the legal requirements of service coupled with the submission of perjurious affidavits of service. This practice

is commonly referred to as "sewer service."[1] In Central Budget Corp. v. Knox, 307 N.Y.S. 2d 936 (Civ. Ct. N.Y. Co., 1969) the court recognized that sewer service was a problem of great magnitude stating:

> It is common knowledge, and has been for at least a year, that some process servers engaged by attorneys to serve papers in connection with cases pending in this Court have habitually submitted perjurious affidavits of service.... This is more than a problem. It is a scandal...(307 N.Y.S. 2d at p. 938).

The uncertainty of conspicuous service coupled with the prevalence of "sewer service" combine to prevent RPAPL §735 from insuring adequate notice to tenants.

The problem is compounded because in a non-payment summary proceeding in the City of New York if the tenant defaults, the court automatically issues judgment for the landlord. On the basis of this judgment, the tenant will be removed from his home by the Marshal (RPAPL §742).

The Court's procedure in automatically issuing judgment is in accord with Section 732 of the

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1. See generally 3 Columbia Journal of Law and Social Problems, Abuse of Process: Sewer Service (1967); 23 Record Association of the Bar of the City of New York, 263 (1968); Default Judgments in the New York Civil Court; a Preliminary study by the Congress of Racial Equality, introduced as Exhibit "A" in Velazquez v. Thompson, Docket No. 35556, U.S. Ct. of Appeals, 2nd Cir.

RPAPL (as adopted for New York City, by Rule 21 of the Rules for the Civil Court of New York):

> If respondent fails to answer within five days from the date of service, as shown by affidavit or certificate of service of the notice of petition and petition, the judge shall render judgment in favor of the petitioner (RPAPL §732[3]). (Emphasis added.)

In the context of the notorious prevalence of "sewer service" in the City of New York and the singular importance of shelter, it is a violation of due process for the court to issue its judgment simply on the basis of the often fraudulent affidavit of a process server, and the petition of the landlord. Kluprott v. United States, 335 U.S. 609 (1949) mod. 336 U.S. 949 (1949); Covey v. Somers, 351 U.S. 141 (1956); Thompson v. Louisville, 362 U.S. 199 (1960); Armstrong v. Manzo, 380 U.S. 545 (1965).

B. New York's Real Property Actions and Proceedings Law denies tenants adequate time in which to answer and prepare for trial and denies them procedural safeguards at other crucial stages of the litigation.

That summary proceedings under the RPAPL deny to tenants procedural benefits and safeguards can readily be seen upon a cursory comparison of that law with pertinent provisions of the Civil Practice Law and Rules (CPLR) and the Civil Court Act (CCA) which are generally applicable to all other actions affecting real property such as ejectment, partition, settlements of claims to

real property and adverse possession as well as to most actions affecting personal property. A summary examination of the differing procedures provided at crucial stages of litigation will serve to demonstrate that there are important disparities and that these disparities consistently operate to the disadvantage of the tenant.

Manner of Service

Article 7 sets forth procedures for service of process, necessarily affecting the fundamental due process right to adequate notice, which are less stringent than those provided for in the CPLR. RPAPL §735 permits conspicuous service after a reasonable attempt at personal or substituted service has failed, whereas CPLR §308, which is also applicable under the CCA, requires that there be due diligence to serve personally or by substitution before conspicuous service may be employed. Moreover, where there has been conspicuous service the CPLR provides that proof of service must be filed with the clerk within 20 days and that service is complete ten days after such filing. However, under RPAPL §735 proof of conspicuous service must be filed within three days and service is complete upon filing. Thus, the tenant is deprived of time in which to obtain counsel, prepare his defense or take any other steps to protect his interests. In summary proceedings conspicuous service is in fact most commonly used even though due to the nature of the proceedings the tenant's place of residence is ordinarily known and there rarely would appear to be any justification for other than personal service.

Argument

Time of Answer

Answers under the RPAPL may be made at the time the petition is noticed to be heard or prior to that in certain situations (RPAPL §743). The petition must be noticed to be heard not less than five or more than twelve days after service (RPAPL §733).

In non-payment proceedings in the City of New York tenants are required to answer within five days after service (RPAPL §732). However, CPLR §3012(a) and (c) which generally govern the time in which to answer provide that answers must be made within 20 days after service where the service has been personal and within 30 days where conspicuous service has been used. Similarly, in recognition of the fact that mail deliveries take time and are a less certain method of service, CCA §402 provides for additional time in which to answer where there has been conspicuous service. That section provides that answer must be made within ten days where the service is personal and with thirty days where not personal. Thus, under Article 7 not only is the benefit of a longer more reasonable time in which to answer denied to tenants but by failing to provide additional time in which to answer where there has been conspicuous service, tenants are actually afforded less time in which to answer, by reason of the delay entailed by mailing, than they would have had if the service had been personal. In reality the requirement that a copy be nailed to the door of the premises is rarely met and furthermore it cannot be assumed that actual notice is given even when a copy is affixed to the door for the reason that it

is not subject to the control of the tenant and may be removed by anyone.

Time of Trial

Under RPAPL §732(2) trials must be set by the clerk not less than three or more than eight days after joinder of issue and under RPAPL §733(1) trial must be set for not less than five or more than twelve days after service. On the other hand under CPLR §3402 the trial is set for twenty days after service of an answer or forty days where there has been no answer and CCA §1301 provides for trial not less than five or more than fifteen days from joinder of issue. Thus under both the CPLR and the CCA, a greater amount of time is afforded before trial than is granted under Article 7.

Inquest

In summary proceedings the essential relief granted is a judgment awarding possession of the premises to the landlord. The judgment for money in the non-payment proceeding is merely incidental to the judgment for possession. Moreover unless service of the Notice of Petition and Petition is by personal service or due diligence is shown before substituted or conspicuous service is used, no judgment for money can be entered where the tenant defaults in answering. RPAPL §735, Wayside Homes, Inc. v. Upton, 40 Misc. 2d 1087, 244 N.Y.S. 2d 624 (Dist. Ct. Nassau Co. 1963); Joseph E. Seagram & Sons, Inc. v. Rossi, supra.

Argument

Rule 18(b) of the Civil Court Rules provides that where the judgment is for relief other than, or in addition to, a certain sum of money, legally acceptable proof of the claim must be submitted to the Court before a default judgment will be granted. And CPLR §3215 provides that unless the judgment is solely for a sum certain application for a default judgment must be made to the Court, and if the defendant ever appeared in the case, it must be on notice to him. All of these protections accrue to the ordinary defendant. However, a tenant against whom a judgment of possession for non-payment of rent is being sought, is denied such protection. RPAPL §732 (3) provides that if such a tenant defaults, the judge shall render judgment in favor of the petitioner, with no inquest, no requirement that legally acceptable proof be offered to the Court.

Stay of Execution of Warrant

Under Article 7 the length of time which the execution of a warrant may be stayed in non-payment proceedings in New York City is limited to 5 days where there has been a trial or 10 days where there is a default in answering. (RPAPL §732 [3]). Because in New York City the great bulk of eviction proceedings are based on non-payment of rent, large numbers of tenants must suffer the incalculable hardship of being evicted from their homes on extremely short notice. It must constantly be borne in mind that due to the acute housing shortage in New York City it is a practical impossibility for all

but the rich to secure replacement housing which they can afford in such a short period of time. Generally under CPLR §2201 a court may grant stays upon such terms as may be just without any specified time limitation. If this general standard were applied to eviction proceedings in New York City, stays of much greater duration than those provided for by statute would be granted given the housing shortage existing in New York City. Although longer stays are permissible in all eviction proceedings outside of New York City, [4 months (RPAPL §751 (4))] and in hold-over proceedings within New York City, [6 months (RPAPL §753 (1))] even these time limitations are often inadequate. New York City tenants subject to the 5 day-10 day stay in non-payment proceedings, and other tenants subject to the 4 month or 6 month stay are all caused to suffer hardships on account of the time limitations, hardships which are not suffered by parties to other actions involving real and personal property.

Execution of Warrant

A warrant of eviction may be obtained and the eviction accomplished within 72 hours after entry of the judgment (RPAPL §749[2]). However under RPAPL §221 other property actions resulting in judgments of possession may not be executed upon except after application to the court showing non-compliance with the judgment.

In order to comprehend the degree to which tenants are discriminated against, Article 7 must be read as a whole. The effect of any one provision

such as that regarding service of process is compounded by other provisions which serve to diminish the tenant's ability to defend against the proceeding such as the shortened time limit for completion of service, time in which to answer and time in which trial may be set. Under RPAPL Article 7, tenants are thus deprived of substantial procedural benefits and safeguards which the state affords to persons with other interests in real and personal property.

C. Stringent conditions unnecessarily limit the tenants' right to appeal.

An appeal from a judgment of eviction is meaningful for residential tenants only so long as the judgment is stayed until the appeal is decided because once vacated, an apartment will seldom, if ever, be regained. The conditions upon which a stay is granted are therefore of great importance to all tenants and especially to those who are poor.

Unfortunately, it is the uniform practice of New York appellate courts to grant stays of eviction pending appeal subject to such onerous conditions that they sharply limit the tenant's access to these courts. Under the common practice, a stay will be granted only if there is deposited with the court (or in some cases, with the landlord) not only the full amount of the judgment but also any other alleged arrears plus the subsequent rental payments as they fall due, see, e.g., Grand Manhattan Co. v. Rodriquez, New York Law

Journal, 2/18/71, p. 19, col. 2 (App. Term, 2nd Dept.). Tenants are thus deprived of their right to contest the validity of the claims for arrears and are also deprived of their statutory right to withhold future rent payments in order to obtain repairs. These are no small rights, as both are often vital to the question of whether the premises will be maintained in a habitable condition.

Residential buildings in poor neighborhoods are notoriously liable to be in dangerous disrepair (see generally, Report of the National Advisory Commission on Civil Disorders, Bantam ed., 1968, pp. 467-474). Among the most important remedies available to tenants seeking improvements in their housing conditions in New York are those statutes which permit the withholding of rent in substandard buildings, i.e., Article 7A, RPAPL, §755 RPAPL, §302(a), New York Multiple Dwelling Law. These laws provide various methods under which tenants may lawfully withhold rent until repairs are made or can, in certain cases, directly apply the rent monies to the needed repairs. Thus, if a tenant's eviction has been stayed by an appellate court on the condition that rent payments are kept current (or that disputed rents of past months are paid), he is forced to choose between prosecuting the appeal and availing himself of remedies which may be necessary to secure habitable housing. Since, in our experience, most litigation over rental payments involving the poor also involves questions of the safety and adequacy of the housing, the inequities imposed by the type of appellate stays ordinarily granted in New York are a very real burden on a large number of litigants

and therefore rise to the level of a constitutional deprivation.

Conclusion

WHEREFORE, it is respectfully requested that this court find that the Oregon forcible entry and unlawful detainer statutes deprive tenants of rights secured by the United States Constitution, reverse the judgment entered by the court below and enter judgment in favor of appellants.

Respectfully submitted,

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Dated: New York, New York
June 16, 1971

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IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY and ALL OTHER PERSONS SIMILARLY SITUATED,

Appellants,

v.

DORTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR LEGAL AID BUREAU, INC. AS AMICUS CURIAE

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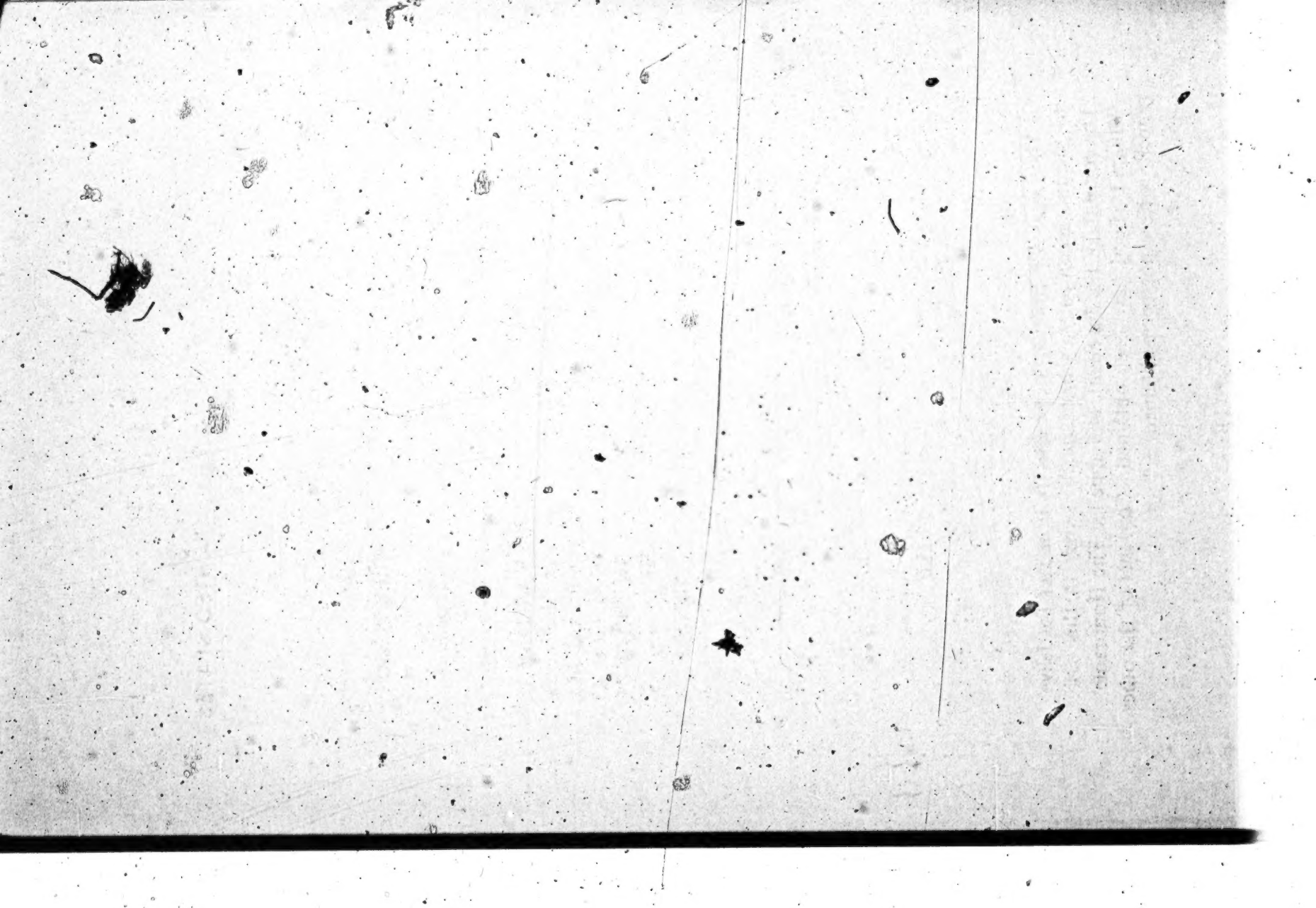

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Legal Aid Bureau, Inc. respectfully moves for leave to file the accompanying brief *amicus curiae* in this case. The consents of the appellants and appellee The Honorable William C. Beers have been obtained. Consents of the other appellees have not been obtained.

The Legal Aid Bureau, Inc. represents indigent tenants residing in Baltimore City and many of the surrounding counties. The 1970 statistics indicate that representation was afforded in 1,421 housing cases, and this case load continues to grow yearly. This should evidence the involvement of the Legal Aid Bureau, Inc. in the area of landlord-tenant law in Maryland. It is felt that the decision in *Lindsey v. Normet** will greatly affect landlord-tenant relations in our State.

Appellants will necessarily concentrate on the peculiar facts of their case. In the brief tendered with this motion, the Legal Aid Bureau, Inc. hopes to demonstrate to the Court that the issues raised in *Lindsey v. Normet* are strikingly similar to those that will be asserted in the attached *Amicus* brief. It will become apparent that the provisions of the Maryland law raise due process and equal protection issues identical to those challenged in Oregon.

Amicus contends that its brief will illustrate that the Maryland statutory provisions, governing the area of landlord-tenant law, effectively deny due process and equal protection of the law.

The grant of the appeal by the Court in this case emphasizes the fact that it evokes questions of national significance considerably beyond the usual implications of local cases dealing with landlord-tenant disputes.

WHEREFORE, it is respectfully prayed that this motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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*Civil No. 70-8 (D. Ore. Sept. 10, 1970), *appeal granted*, 39 U.S.L.W. 3524 (U.S. May 25, 1971) (No. 6158).

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR LEGAL AID BUREAU, INC. AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE**

In recognition of the potential importance of *Lindsey v. Normet*, Civil No. 70-8 (D.Ore., Sept. 10, 1970), *appeal*

*Letters from the appellants attorneys and one appellee, the Honorable William C. Beers, consenting to submission of the brief *amicus*

granted, 37 U.S.L.W. 3524 (U.S. May 25, 1971) (No. 6158), to the landlord-tenant field as it exists in the State of Maryland, the Legal Aid Bureau, Inc., believes that it would be of interest to this Court to describe the eviction procedures in Maryland, indicating how these procedures tend to deprive tenants of the opportunity to litigate legitimate defenses, and the possible effects of this Court's decision upon the relevant Maryland law. The *Amicus* is directly interested in and concerned about this case because of its wide experience in representing residential tenants, particularly indigents in eviction cases, and because of the potential ramification of the Court's decision in redressing the inequities that exist in Maryland landlord-tenant law. It is of critical importance that the Supreme Court recognize the existing constitutional due process problems in the landlord-tenant field generally, and in Maryland particularly.

That the *Amicus* has a great interest in the Court's decision in *Lindsey v. Normet* can best be demonstrated by a brief examination of its experience in the field of landlord-tenant law. The Legal Aid Bureau, Inc , in 1970 counseled clients in 1,421 reported housing cases, and this caseload continues to grow yearly. For every recorded client with a housing problem, it is estimated that staff attorneys counsel, in one form or another, at least two other tenants with similar problems. This caseload evidences the involvement of the Legal Aid Bureau, Inc., in the area of landlord-tenant law in Maryland. *Amicus* is greatly concerned with and will be directly affected by the decision in *Lindsey v. Normet.*

The brief of the *Amicus Curiae* will endeavor to demonstrate to the Court the state of landlord-tenant law in Maryland. Specifically, the statutes governing summary ejectment, distraint for rent, tenants holding over and housing and health codes will be set forth and analyzed. The issues

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curiae have been filed with the Clerk. The consent of the attorney for the remaining appellees was requested but never received. A Motion for Leave to File Brief *Amicus Curiae* has been filed with this brief.

raised in *Lindsey v. Normet* are strikingly similar to those that will be asserted in this *Amicus* brief. It will become apparent that the provisions of the Maryland law raise due process and equal protection issues identical to those challenged in Oregon. Specifically, these include inadequate notice to the tenant of the grounds for and parties to the suit, an unreasonably short time for the tenant to prepare for trial, an inability to raise substantive defenses (especially those based on housing code violations), and an overly burdensome appeal bond requirement. It will be clearly illustrated that these Maryland statutory provisions deny due process and equal protection of the law and whereby the decision in *Lindsey v. Normet* can serve to re-establish constitutionally-mandated guidelines.

SUMMARY OF ARGUMENT

A careful review of the relevant portions of the Landlord and Tenant Law of Maryland reveals several distressing features. Both the complaint and the summons procedures produce inadequate notice to the tenant of the grounds of and the parties to the suit and, as a direct result, severely prejudice the tenant's position. More particularly, in the Maryland summary ejectment proceeding[1] the date of trial is fixed a maximum of three (3) days, assuming a continuance is granted, after the landlord has filed his complaint irrespective of when the tenant actually receives notice of the suit. As such, these Maryland provisions countenance a patently unreasonable notice procedure and a grossly inadequate time in which to prepare for trial.

The tenant in Maryland, exclusive of Baltimore City, can effectively be denied a meaningful defense because of the narrowness of issues which can be raised at trial, particularly the inability to assert housing code violations as a defense to

[1] In the Baltimore City summary ejectment proceeding, there is a twelve day maximum period between the filing of the complaint and the date of trial, assuming a continuance is granted. See pp. 5-6, *infra*.

the withholding of rent. Combined with inadequate judicial and administrative redress for housing and health code violations and the threat of retaliatory evictions, this inability to assert such a necessary defense effectively denies legal redress to legitimate grievances urgently in need of amelioration. Thus, for the tenants of Maryland, constitutionally guaranteed due process is denied in the pre-trial and trial procedures.

The posting of a bond to stay execution of judgment pending appeal may be as much as double the actual amount of rent due and thereby prove to be so prohibitively expensive, especially to indigent tenants, that legitimate appeals are effectively and indiscriminatly pre-empted. Such a salient denial of due process should not be constitutionally tolerated.

ARGUMENT

I. THE SUMMARY EJECTMENT PROCEDURE FOR NON-PAYMENT OF RENT IN BOTH THE STATE OF MARYLAND AND BALTIMORE CITY SERVES TO DENY DUE PROCESS AND EQUAL PROTECTION.

A. Statement of the Applicable Law

The Maryland law of Landlord and Tenant is found in the Annotated Code of Maryland, Article 53 (1957) and is divided into two parts, "Tenants Holding Over"[2] and "Distress for Rent,"[3] the latter composed of distraint and ejectment proceedings. These State laws are supplemented by the Public Local Laws of Maryland, which, where applicable, will be controlling.[4] In particular, for Baltimore City there are extensive controlling Public Local Laws. The general body of these Baltimore City Statutes is found in

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[2] ANN. CODE MD., [hereinafter cited as, A.C.M.], art. 53, §§ 1-8 (1957).

[3] *Id.*, §§ 9-39R.

[4] *Id.*, art. 1 § 13.

the Code of Public Local Laws of Maryland, Article 4, Baltimore City, Subtitle 9. It should be noted that, according to the 1970 U.S. Census advance housing sheets,[5] only 157,384 of the State's total 465,761 renter-occupied units are actually in Baltimore City.

Maryland's summary ejectment procedure for non-payment of rent[6] is commenced by the landlord's written complaint[7] under oath before a district court judge. In this complaint, only the barest skeleton of information is required: a description in general terms of the property sought, the name of the tenant, and the amount of rent due and unpaid. A summons is then issued to be served by the constable directing the tenant to appear for trial on the second day after the filing of said complaint. The summons is to be served on the tenant personally, or if he is not present, then affixed conspicuously upon the premises.[8] Beginning January 1, 1972, service must also be sent to the tenant by first-class mail.[9]

In Baltimore City repossession of the premises under a summary ejectment proceeding, applicable certainly for residential tenancies of a term of one year or less,[10] is initiated as under the Maryland State Laws. The court will then issue a summons which sets the trial on the fifth day

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[5]U.S. Dept. of Commerce, Bureau of Census, "1970 Census of Housing, Maryland," February, 1971, p. 5.

[6]A.C.M., art. 53, § 39N (1957).

[7]See sample complaint form, *Appendix.*

[8]A.C.M., § 39-*O* (May 21, 1970); ch. 731, Laws of Maryland, 1970, Part 8; re-enacting A.C.M. art. 53, § 39-*O* (1957). This footnote as the other statutory footnotes to follow herein, covers all the statutory material since the last footnote in the text.

[9]A.C.M., art. 53, § 39-*O* (May 24, 1971); ch. 745, Laws of Maryland, 1971 (effective January 1, 1972).

[10]CODE PUB. LOCAL L. MD. [hereinafter cited as C.P.L.L.M.], art. 4, § 9-2 (1969).

after the filing of the complaint. This summons shall be served by a constable on or before the third day after filing, and the mode of service shall be the same as under the Maryland state law.[11] Such a summary ejectment proceeding does not preclude the landlord from bringing an independent suit for the rent due and unpaid.[12]

If it appears to the judge that justice will be better served by adjourning to enable either party to procure necessary witnesses, then a continuance of not more than one day (seven days in Baltimore City[13]), except by consent of all parties, may be granted. At the trial, if it appears to the judge that the rent or any part of the rent for the premises is actually due and unpaid, judgment shall be granted in favor of the lessor for the amount of rent found due, with costs of the suit, and the tenant shall render up possession within two days thereafter.[14] In Baltimore City, however, an extension may be granted at the court's discretion upon certification by a physician of a danger to the health or life of any occupant of the premises.[15]

Maryland state law provides that if the tenant, at the time of trial, tenders the rent found due and unpaid, together with costs, any further proceedings in the suit will be terminated.[16] On the other hand, in Baltimore City the rent found due together with costs may be tendered at any time until the actual order of execution is issued. Furthermore, until actual execution of the warrant of restitution, if the

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[11] C.P.L.L.M., art. 4, § 9-3 (May 21, 1970); ch. 731, Adv. Sheets Laws of Maryland, 1970, Part 8. A.C.M., art. 53, § 39-*O* (May 24, 1971); ch. 745, Laws of Maryland, 1971 (effective Jan. 1, 1972).

[12] C.P.L.L.M., art. 4, § 9-4 (1969).

[13] *Id.*, § 9-5.

[14] A.C.M., art. 53, § 39P (1957).

[15] C.P.L.L.M., art. 4, § 9-5 (1969).

[16] A.C.M., art. 53, § 39P (1957).

judge determines that the interests of justice clearly so require, the landlord may be compelled to accept a payment of all rent due plus court costs and all other reasonable costs in satisfaction of the complaint.[17]

If the tenant has not complied with the repossession order within two (2) days, he may be evicted by the constable, by force if necessary, if the lessor so exercises this authority and the judge issues a warrant of restitution.[18] At any time during this two day period following judgment the tenant may appeal, but in order to stay execution of the judgment a bond must be given to the landlord

> with one or more securities, who are owners of sufficient leasehold or real estate in the State of Maryland, with condition to prosecute the appeal with effect, to answer to the landlord, his executors, [or] administrators, in all costs and damages mentioned in the judgment, and such other damages as shall be incurred and sustained by reason of said appeal.[19]

As of July 1, 1971, unique to Baltimore City, there exists an amended rent escrow law[20] and concomitant retaliatory eviction law. This new escrow law is the only available remedy, permitting the withholding of rent because of imminently dangerous housing conditions. These laws provide that tenants in rent proceedings may assert defensively or affirmatively the existence of conditions that represent fire hazards or serious threats to the life, health, or safety of occupants. Under these circumstances the tenant is permitted, if the landlord has been given due notice and an opportunity to repair, to pay the rent owing into the court to be held in escrow and released to effect repairs.

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[17] C.P.L.L.M., art. 4, § 9-5 (1969).

[18] A.C.M., art. 53, § 39Q (May 21, 1970); ch. 731, Adv. Sheets, Laws of Maryland, 1970, Part 8.

[19] A.C.M., art. 53, § 39R (1957).

[20] The original rent escrow law in Baltimore City became effective July 1, 1969. C.P.L.L.M., art. 4, § 9-9 (1969).

Furthermore, absent a showing of good faith, evictions and rent increases of tenants exercising this rent escrow law are forbidden for six months following the determination of the merits of the case by the court.[21] There is also unique to Baltimore City a new warranty of habitability statute, effective July 1, 1971, that provides an implied warranty of fitness for human habitation in all leases that can only be exercised within the first thirty days of occupancy.[22]

B. Due Process and Equal Protection Are Denied Tenants Because the Applicable Law Provides for Inadequate Notice, Unreasonably Short Time To Prepare for Trial, Unjustified Restrictions on the Defenses Available, and Overly-Burdensome Appeal Bond Requirements.

Maryland's summary ejectment procedure for non-payment of rent requires no detailed pleading of fact by the landlord, because by its nature the tenant's only potential defenses, except in Baltimore City, are that payment has already been made or that no payment is actually due. This minimal pleading can prove distinctly prejudicial to the tenant because it provides inadequate notice of the grounds of the suit and the parties thereto. There exist situations when, through no fault of his own, a tenant will pay rent to the wrong landlord or agent because he has not received notice of the transfer of the right to receive such rent. Then, when the summary ejectment proceeding is initiated without a detailed pleading of facts, the tenant will be unaware of who the plaintiff is and why the proceeding has been brought. It will thus be impossible for the tenant to adequately prepare his defense, and guarantee due process, especially in the time period permitted under the statute.

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[21] C.P.L.L.M., art. 4, § 9-9 (May 24, 1971); ch. 687, Laws of Maryland, 1971.

[22] C.P.L.L.M., art. 4, § 9-14.1 (May 17, 1971); ch. 481, Laws of Maryland, 1971.

Due to the limited defenses permissible under the State summary ejectment procedure, the landlord is permitted to escape a detailed sworn fact pleading that might both better notify the tenant in order to allow for adequate preparation of a meaningful defense and better inform the court of the actual conditions surrounding this tenancy. Even if additional substantive defenses could be raised, as in Baltimore City, this lack of a detailed sworn fact pleading when combined with the absence, in both the State and the City, of any discovery procedure can effectively result in a denial of due process.[23]

An even more patent denial of due process surrounds the arbitrary determination of the trial date and notification thereof. Under Maryland state law the date of trial is set on the second day after the filing of the complaint rather than after receipt of the summons, service of which is subject to abuse. This procedure operates seemingly irrespective of how long service actually takes. There is no operative guarantee to insure that notice will actually be received even before the date of trial, thus denying due process. Even with the one day discretionary continuance, there is little prospect of more than two days total in which to prepare for the trial.

Although mailing of the summons or a copy may alleviate some of the problems of affixing it to the premises, this new service procedure highlights the inadequacy of time available in which to prepare since mail delivery takes no less than one full day and perhaps even longer. With the inadequate time to prepare meaningfully for trial which two days or less offers, due process is hereby denied. It should be noted however that the provision in Baltimore City providing for a postponement of up to seven days may serve to ameliorate this timely notification problem, but

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[23]The Maryland District Court Rules specifically state that no discovery is provided in landlord-tenant proceedings. *Maryland District Rules*, adopted July 1, 1971, ch. 400, "Deposition and Discovery," Rule 401(a).

only if the matter is brought to the judge's attention and he chooses to exercise his discretionary power.

At the trial itself, a tenant not subject to Baltimore City law is precluded from raising defenses based upon housing code violations. Even if the tenant had paid his rent into his own escrow account and thereby remained ready and able to pay his landlord upon rectification of the code violations, he would still be denied legal redress of such violations (especially considering the lack of effective enforcement of the housing code in Maryland that will be considered herein). Furthermore, this tenant even risks the loss of his residence either through failure to tender the rent due at trial or through a retaliatory eviction. Thus by being precluded from raising housing code violations as a legitimate defense and by being threatened by the ever-present danger of a retaliatory eviction, the tenant is effectively denied substantive redress at his trial.

Lastly, under both the Baltimore City and State procedures, which will be practically meaningless without a stay of execution, appeals require that a significant bond[24] be posted. Such a bond becomes progressively more burdensome in direct relationship to the poverty of the tenant. This hardship is compounded by the plight of the indigent, unable to obtain the necessary sureties without paying exorbitant and effectively prohibitive premiums. In addition, the bond may be set, and as commonly practiced (*Clayton v. Cherigos*, 79A Folio 206, 43324A (Cir. Ct. #2 Baltimore City, Aug. 21, 1970)) is indeed set, so as to accelerate the liability for future rent to be due during the course of appeal. The tenant must either contract for an appeal bond and thereby forfeit a premium to the bondsman or secure immediate funds to deposit in a lump sum with the court to meet the accelerated rent due. This is a practical impossibility for the indigent. Such an appeal structure effectively denies due process and equal protection to those unable economically to prosecute appeals.

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[24] A.C.M., art. 53, § 39R (1957). C.P.L.L.M., art. 4, § 9-7 (1969).

II. MARYLAND'S DISTRAINT FOR RENT PROCEEDING SERVES TO EFFECTIVELY DENY CONSTITUTIONALLY MANDATED DUE PROCESS.

A. Statement of the Applicable Law

Maryland's distraint for rent proceeding applies to unpaid rent only under a written lease for a term exceeding three months, or under a tenancy at will or a periodic tenancy that has continued for over three months.[25] In Baltimore City this procedure is not available to the landlord where the tenancy is of a term of less than three calendar months.[26] To initiate the action the landlord, as plaintiff, petitions the court naming the tenant as defendant. This petition sets forth the names and addresses of all parties and the facts as to any assignment of the lease, the premises leased, the date and term of the lease, the rent required to be paid under the lease, and the amount of arrears.[27] After filing of the distraint claim, an order levying upon all goods not exempted by law will be promptly issued and served along with the petition upon each tenant present on the leased premises. If no tenant is found thereon, then the petition and order shall be affixed in a prominent place inside the premises,[28] but entry is not to be forcible without a court order if the leased premises is used as a dwelling. Levy may, however, be made at any hour of the day or night.[29]

The tenant may file an answer setting forth any defenses including, but not limited to, the fact that excessive rent is claimed or that the rent sued upon is not distrainable. A

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[25] A.C.M., art. 53, § 9(c) (1957).

[26] C.P.L.L.M., art. 4, § 9-1 (1969). In Baltimore City, a month to month tenancy that has continued for over three calendar months is still to be treated as a tenancy for a term of one month.

[27] A.C.M., art. 53, § 11 (1957).

[28] *Id.*, § 12.

[29] *Id.*, § 15.

hearing on defendant's answer must be held on not more than ten day's notice sent by regular mail, except that the court shall have the power to postpone the proceedings on due notice to all parties. At the hearing the court is to decide all issues and may then order a sale of the goods distrained. If the tenant has failed to file an answer within seven days after levy, the court may *sua sponte* or on motion of the landlord issue an order of sale. The sale shall take place at the court's discretion but as soon as practicable.[30] Where goods have been removed the court may issue an order to "follow the goods." Entry under such order may be forcible.[31]

Service of all process after the original petition in distraint may be by ordinary mail, and a claim of nonreceipt shall not affect the validity of the notice or the order which is mailed.[32] If the court finds that notice has actually not been received and injustice will result, the court may order a stay of further proceeding until the unnotified party has had an opportunity to protect his interests.[33] An appeal from any final order or judgment may be brought within fourteen days and the trial shall be *de novo* with the right to request a jury. The appeal will not operate as a stay of the execution of a judgment or a subsequent distraining proceeding unless an approved appeal bond is filed.[34] Such a bond may require the posting of double the sum to be recovered by the landlord.[35]

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[30] *Id.*, § 21.

[31] *Id.*, § 22.

[32] *Id.*, § 37.

[33] *Id.*, § 38.

[34] *Id.*, § 39.

[35] *Id.*, art. 5, § 36.

B. Due Process Is Effectively Denied Because the Applicable Law Provides for Inadequate Notice, Unreasonably Short Time To Prepare for Trial, Unjustified Restrictions on the Defenses Available, and Overly-Burdensome Appeal Bond Requirements.

Maryland's distraint for rent proceeding provides for a more detailed fact pleading than that allowed in the summary ejectment procedure. But if this is the only information on which the tenant must rely in order to prepare a defense, it might well be inadequate and thereby prejudice such defense. Many instances exist where such a tenant might not from this pleading be adequately put on notice as to the substantive grounds available for defense. For example, a tenant may not have received notice of a rent increase through no fault of his own. The tenant may believe he had paid all his rent, but one payment may have been lost or misplaced and not sued on until now. These tenants might not from this pleading be aware of the valid defenses available to them. This problem is further compounded by the complete absence of pre-trial discovery procedures.[36]

As an alternative to personal service, the distraint procedure permits affixing the petition and levy order inside the premises. This, of course, raises the issue of actual as opposed to constructive notice. What happens if the tenant is away from home for a time, especially since these are rather summary proceedings? To some extent, because a continuance may be granted, the provisions of this section offer some protection if the court finds notice has not actually been received. However, problems still surround the requirement of a tenant's answer in seven days. In the absence of an answer, a default order of sale may be issued. It is not realistic to imagine that a court will be able to determine that notice has not actually been received without the tenant himself so informing the court.

[36] See footnote *23*, p. 9, *supra*.

The levy provisions have at least one highly suspect procedure. It may well be unreasonable to permit such a levy at any hour of the day or night without any further limitation. Due process or reasonable security of the home requires there be some restriction on the use of this levy authority, or, at the minimum, some showing of necessity for these unreasonable levies.

In his answer, the tenant probably could not raise housing code violations with effect. While the provision states that "any defenses"[37] may be asserted, in practice the operative clause following, although only illustrative of the type of defenses possible, is interpreted in a limited fashion. Even if the answer could assert such housing code violations as a defense, there is certainly no indication that the court would give any effect to such a critical assertion with basic health and safety implications.

Finally, the bond required for a stay of execution pending appeal may at the discretion of the court actually be a double rent due bond requiring sufficient security. Such a double rent bond not only is likely to be so prohibitively unreasonable as to effectively deny indigent tenants the opportunity for appeal, but also suspiciously resembles a penalty clause. Due process and equal protection cannot be so lightly and unreasonably forfeited in the name of preventing spurious appeals.

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[37] "... any defenses he may have to the action, including, but not limited to, excessive rent distrained for, or that the rent sued is not distrainable." A.C.M., art. 53, § 21 (1957).

III. THE PROCEDURE IN MARYLAND FOR TENANTS HOLDING OVER DENIES DUE PROCESS OF LAW.

A. Statement of the Applicable Law

The Maryland "tenant holding over" procedure is initiated by the lessor who desires to repossess the premises leased at will or for a definite term. Notice in writing must be given one month prior to expiration of the term or determination of said will.[38] In Baltimore City there is a detailed notice of termination. Sixty (60) days written notice to quit is generally required, except for thirty days in certain circumstances including tenancies for not more than five months.[39] This notice must be served on the tenant personally, or left at his abode or business, or with his agent or servant, or served on any occupant of the premises. If personal service cannot be effected the notice may be affixed conspicuously on the premises.[40] This notice need not state

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[38] *Id.*, § 1. The following procedures for tenants holding over in the State of Maryland shall apply to periodic tenancies by the year, by the month, and by the week. Outside of Baltimore City, notice in a year to year tenancy shall be given in writing three months before the current year's expiration except that in the case of farm tenancies it shall be given six months in advance. In the case of a monthly tenancy, notice shall be given in writing one month in advance, and one week in advance for a tenancy by the week. These same notice proceeding provisions where applicable shall also apply to cases of forcible entry and detainer. If the premises to which the lease pertains is located in any special taxing area or incorporated town of Montgomery County, nothing shall prevent the landlord and tenant from waiving in writing or altering the length of any of the notice to quit requirements. (A.C.M., art. 53, § 7 (1957)). If the tenant gives the landlord one month parol notice of his intention to remove and surrender possession at the end of the term (except three months notice is required for year to year tenancies other than farm tenancies where six months is required), then it shall not be necessary for the landlord to prove written notice to the tenant. (A.C.M., art. 53, § 8 (1957)).

[39] C.P.L.L.M., art. 4, § 9-14 (1969).

[40] *Id.*, § 9-17.

the hour by which the tenant is requested to leave.[41] The time and manner of notice may further be modified by agreement of the parties.[42] Such notice requesting the tenant to leave shall entitle the landlord to proceed in court for the speedy recovery of the premises upon expiration of this period.[43]

Under Maryland state law, if the tenant refuses to comply with the notice to vacate, the lessor may make a complaint in writing to a judge,[44] who issues his summons for the tenant to appear and show cause why restitution should not be made immediately. If either party fails to appear on the date indicated in the summons, the judge continues the case to a day at least six and no more than ten days later and notifies the parties of same.[46]

In Baltimore City, in initiating the court proceedings against a tenant holding over, if the first summons issued is returned *non est*, a second summons returnable in not less than five days is issued. If the tenant is not found, a copy of this second summons is left with the occupant of the premises or affixed to the premises if vacant. If the tenant does not appear on the date of trial assigned in the summons, the judge proceeds as if the tenant had appeared.[47] The landlord is permitted to file interrogatories to be answered by the tenant[48] and they may be served in a like

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[41] *Id.*, § 9-18.

[42] *Id.*, § 9-20.

[43] *Id.*, § 9-19.

[44] A.C.M., art. 53, § 1 (1957).

[45] *Id.*, § 2.

[46] *Id.*, § 3.

[47] C.P.L.L.M., art. 4, § 9-23 (1969).

[48] *Id.*, § 9-24.

manner.[49] The tenant shall have three days from the day of service to respond, subject to an eight day maximum extention for good cause. Upon failure to respond, the tenant loses in default.[50]

Under the laws of the State of Maryland, if the judge shall find, at the hearing, or upon failure of the tenant to appear after the summons and continuance, that the lessor had been in possession of said premises, that the lease is fully expired, that due notice has been given, and that the tenant has refused to quit, then the judge shall give judgment for restitution, issue his warrant to the constable, and assess costs against the tenant. A tenant may appeal by filing notice of his desire to do so within ten days. If the tenant desires to remain in the premises pending appeal, the notice must be accompanied by an affidavit made by the tenant before the judge or some officer empowered to take acknowledgments of deeds that this appeal is not taken for purposes of delay. This must be accompanied furthermore by a bond with one or more securities conditioned that the appeal will be prosecuted and that all rent in arrears, court costs, and losses or damages suffered by the landlord because of the tenant's holding over will be paid.[51] The appeal shall be heard between five and fifteen days after application by either party and notice will be served on the opposite party or his counsel at least five days before the hearing.[52]

Judgment for restitution will not be granted if the tenant alleges title to the premises in some third party who appears before the judge and takes an oath that he, the third party, believes he is entitled to the premises and subsequently posts a bond with two sufficient securities to prosecute this claim

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[49] *Id.*, § 9-26.

[50] *Id.*, § 9-25.

[51] A.C.M., art. 53, § 4 (1957).

[52] *Id.*, § 5.

with effect during the next court term. If the third party does not prosecute, the restitution will be granted within ten days after the end of the term.[53]

In Baltimore City, if judgment is entered against the tenant, the judge may assess damages not to exceed double the rate of rent of the tenancy, in addition to the expenses of the landlord over and above the legal costs.[54] If the judge finds for the tenant, he may levy such damages, and all related costs as seem just.[55] Rather than pursue these court proceedings, the landlord may elect to hold the lessee over as a tenant at double the former rent for the premises, subject to the former terms and conditions of payment.[56] Finally, appeals may be taken, but in order to stay execution of the judgment in the court below, a tenant is required to post a bond with security with condition to prosecute the appeal and to answer to the landlord for all costs and damages incurred in the court below as well as those sustained on appeal.[57]

B. The Applicable Law Effectively Denies Due Process to Tenants Because it Provides for Inadequate Notice, Unreasonably Short Time to Prepare for Trial, Unjustified Restrictions on the Defenses Available, and Overly-Burdensome Appeal Bond Requirements.

The law in the State of Maryland for tenants holding over is devoid of any detail as to the content of the written complaint and summons. Given the fact that prior notice of termination is critical to the subsequent suit for holding

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[53] *Id.*, § 6.

[54] C.P.L.L.M., art. 4, § 9-27 (1969).

[55] *Id.*, § 9-28.

[56] *Id.*, § 9-29.

[57] *Id.*, § 9-30.

over, it would seem imperative that it at least specify certain necessary facts, so that the tenant might have an adequate opportunity to prepare his defenses. These notification defects may be mitigated by liberally granted continuances. The statutes themselves, however, should definitely contain better provisions for notice, thus insuring due process.

Under the Baltimore City Code the actual court proceeding commences with the issuance of a summons, so minimal in content that the tenant may not have adequate notice of the claim. In this proceeding it is important to note that the landlord alone is authorized to file interrogatories. This suggests that there may indeed be real fact issues upon which the parties need to exchange information, but over which only the landlord has control, buttressed by rather severe sanctions against the tenant. Introduced here is an inequitable bias in the respective positions of the landlord and tenant, further evidenced by the landlord's unilateral power to hold the tenant to a new term at double the former rent if he so elects. Such statutory authority effectively imposes a penalty clause on every lease, and should be declared void as against public policy. Apparently, under state law, as utilized in Maryland, the tenant at the court hearing is not permitted to assert certain defenses. One such defense would be the tenant's claim that he is being evicted in retaliation for his reporting a housing or health code violation on the premises. If such housing or health codes are to have any real effect in ameliorating living conditions in this State and the nation as a whole, a goal clearly in the public interest, then retaliatory evictions must be prevented or tenants will effectively be denied the equal protection of these housing or health code laws.

In both the State and the City, the tenant holding over procedure requires a bond to stay execution of the restitution order pending appeal. In this appeal proceeding the tenant is further required to make an official affidavit attesting to the valid purposes of his appeal. Even such official assurance with related sanctions is seemingly inadequate to

satisfy the doubts surrounding tenant appeals and will not preclude the appeal bond requirement. Once again the tenant is confronted with this appeal bond that may effectively deny the opportunity to appeal, resulting in a further denial of due process, especially to indigent tenants.

IV.

THE HOUSING AND HEALTH CODES IN MARYLAND, AS ADMINISTERED BY THE RESPONSIBLE AUTHORITIES AND AS CONSTRUCTIVELY SUPPRESSED BY THE THREAT OF RETALIATORY EVICTIONS, (AT LEAST OUTSIDE BALTIMORE CITY), OFFER THE TENANT NO EFFECTIVE RELIEF IN REDRESSING HIS LEGITIMATE GRIEVANCES CONCERNING BASIC LIVING CONDITIONS.

It might be argued that housing or health code enforcement might offer adequate redress in lieu of its use as a defense to evictions. Such a proposition, while appealing in theory, in actuality is not an adequate tool to offer the tenant effective relief.

In Maryland there are housing codes in Baltimore City, Baltimore County, Anne Arundel County, Montgomery County, and less comprehensive codes in Allegany and Howard Counties. For counties without local housing codes there is a general provision of the Maryland Health Code that may arguably be invoked. Article 43, Section 103, Annotated Code of Maryland, (1957), relates to "privies, pigpens, and other noxious places",[58] and speaks in terms of the preservation of the health of any inhabitants. The basic sanctions of both the housing and health code authorities are condemnation, criminal fines and/or imprisonment[59] if voluntary compliance of the responsible party is not forthcoming. None of these remedies is likely to bring about abatement of the particular unhealthy condition.

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[58] A.C.M., art. 43, § 103 (1957).

[59] *Id.*, §§ 103 and 108.

The existing housing and health codes are inadequately and infrequently enforced. Even when such codes are in fact stringently enforced the remedies are ineffective. Condemnation proceedings will only render the tenant homeless, thus further adding to the critical housing shortage. The criminal sanctions are rarely enforced and serve only to punish the landlord, not to repair the dwelling. In fact, some landlords would rather accept the criminal fines imposed than undertake the expense of abating the housing code violations. This lack of enforcement greatly impairs and effectively undermines the deterrent effect for which purpose these sanctions were enacted.

There is available still another remedy in Maryland,[60] but one which the health and housing authorities have heretofore refused to invoke. The health or housing authority can make the necessary repairs itself, up to $500,[61] and then assess the costs of abatement against the responsible party by taking a lien on his property. This lien is not authorized as a prior lien, and therefore, practically speaking, is likely to be uncollectible. Thus, health and housing authorities have refused to avail themselves of this quasi-"self-help" remedy on the grounds of economic impracticability, and the tenant in Maryland is left with either his original unhealthy dwelling or no dwelling at all, either because of condemnation or retaliatory eviction.

CONCLUSION

Because of our substantial contact with landlord-tenant laws in Maryland, the Legal Aid Bureau, Inc., strongly believes that the decision in *Lindsey v. Normet* will be of significant importance in clarifying the meaning of due process in landlord-tenant relations. It is here that the decision in *Lindsey v. Normet* can be most meaningful.

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[60] *Id.*, §§ 111-113.

[61] *Id.*, § 111.

Guidelines are most desperately needed so that existing impediments to a constitutionally mandated court proceeding may be removed.

Clarification is exigently needed because in Maryland several laws exist which severely impede the ability of the tenant to adequately defend his legitimate interests and to meaningfully redress legitimate grievances. The decision in *Lindsey v. Normet* can serve positively and constructively to help ameliorate the burdensome plight of tenants, frequently confronted by deteriorating housing conditions, callous and uncooperative landlords, and a bewildering imbalance in the judicial procedure for redress.

The constitutional issues raised by *Lindsey v. Normet*, and similar issues presented by the Maryland statutes, have been described by this *Amicus* in the hope that this Court will recognize the urgent need for reform in the area of landlord-tenant law. The decision of the court below should be reversed and new guidelines re-establishing due process in the landlord-tenant field should be set forth.

Respectfully submitted,

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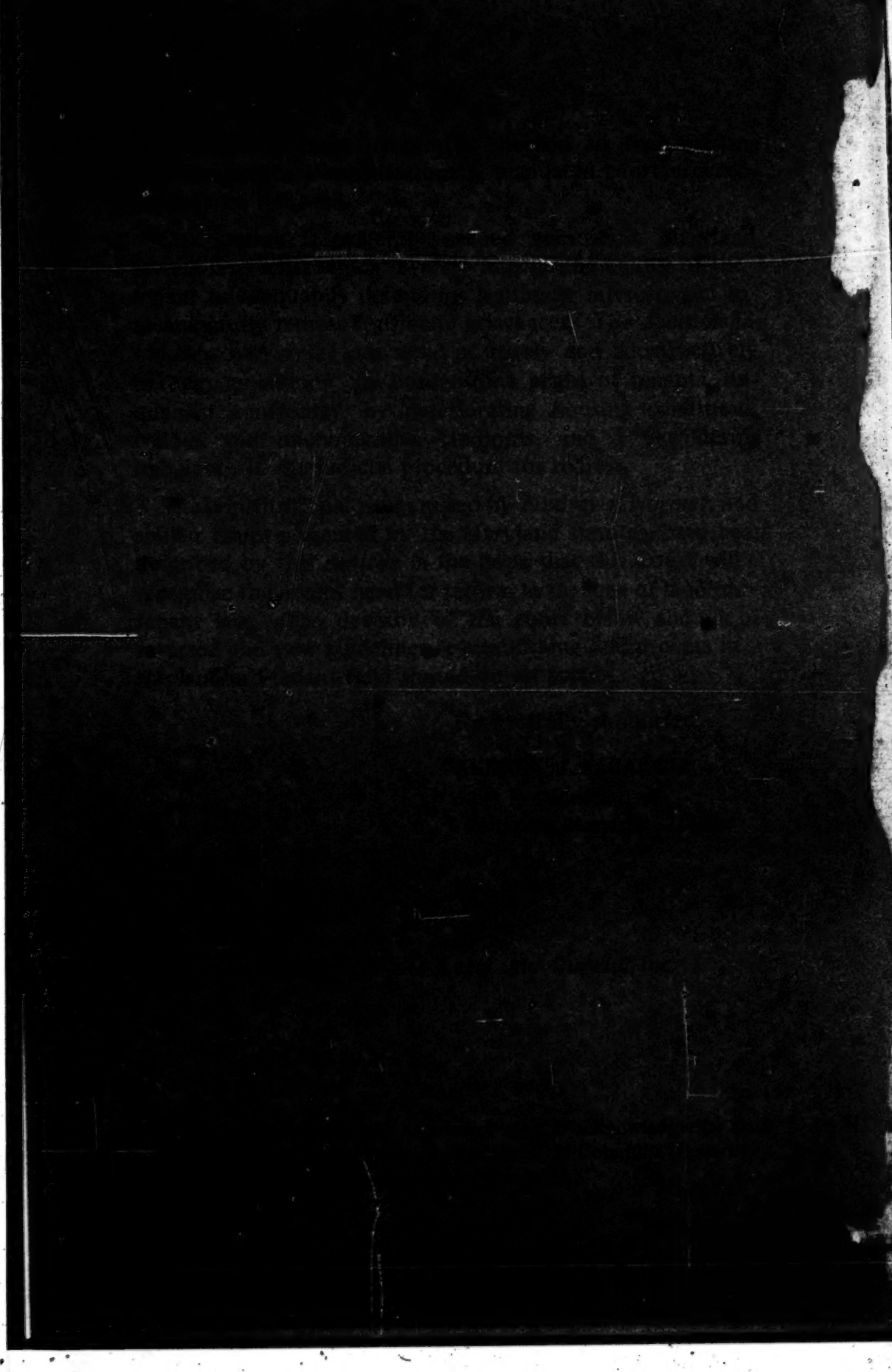
[The Legal Air Bureau and its counsel wish to acknowledge the assistance of Richard L. Wasserman, a student at the Columbia University School of Law in the preparation of this brief.]



APPENDIX

No. B

PEOPLE'S COURT
OF
BALTIMORE CITY

VS

ATTESTED COPY OF SUMMONS IN EJECTMENT

CONSTABLE

ATTORNEY FOR PLAINTIFF

ATTORNEY FOR DEFENDANT

NOTICE TO TENANT

The costs in this case are $2.50 and have been paid by the landlord.

If the premises are occupied by wife, child or dependent of a person in military service please advise the Chief Constable immediately in writing so that the provisions of The Soldiers' and Sailors' Relief Act may be put into effect if same applies. In any communication please give the number of this case.

ATTESTED COPY OF SUMMONS IN EJECTMENT

No.

PEOPLE'S COURT OF BALTIMORE CITY

28-1113-8868

FAYETTE AND GAY STS.
BALTIMORE MD. 21202

STATE OF MARYLAND, BALTIMORE CITY, TO WIT:
To J. JEROME BUTLER, Esq., Chief Constable, Greetings:

WHEREAS, _____ Lessor, by _____ his duly qualified Agent or Attorney, has this day filed his written complaint, in this court, praying to have again and repossess the premises in said City known as

No. 2E Street

rented from him by _____ Tenant, who has assigned said premises to _____ his assignee or under tenants, whose names are unknown to said Lessor, alleging there is rent due and unpaid to said Lessor the sum of _____ Dollars, 00 Cents.

FOR TRIAL ON

Witness my hand and act on this date subscribed

Chief Judge of the People's Court of Baltimore City

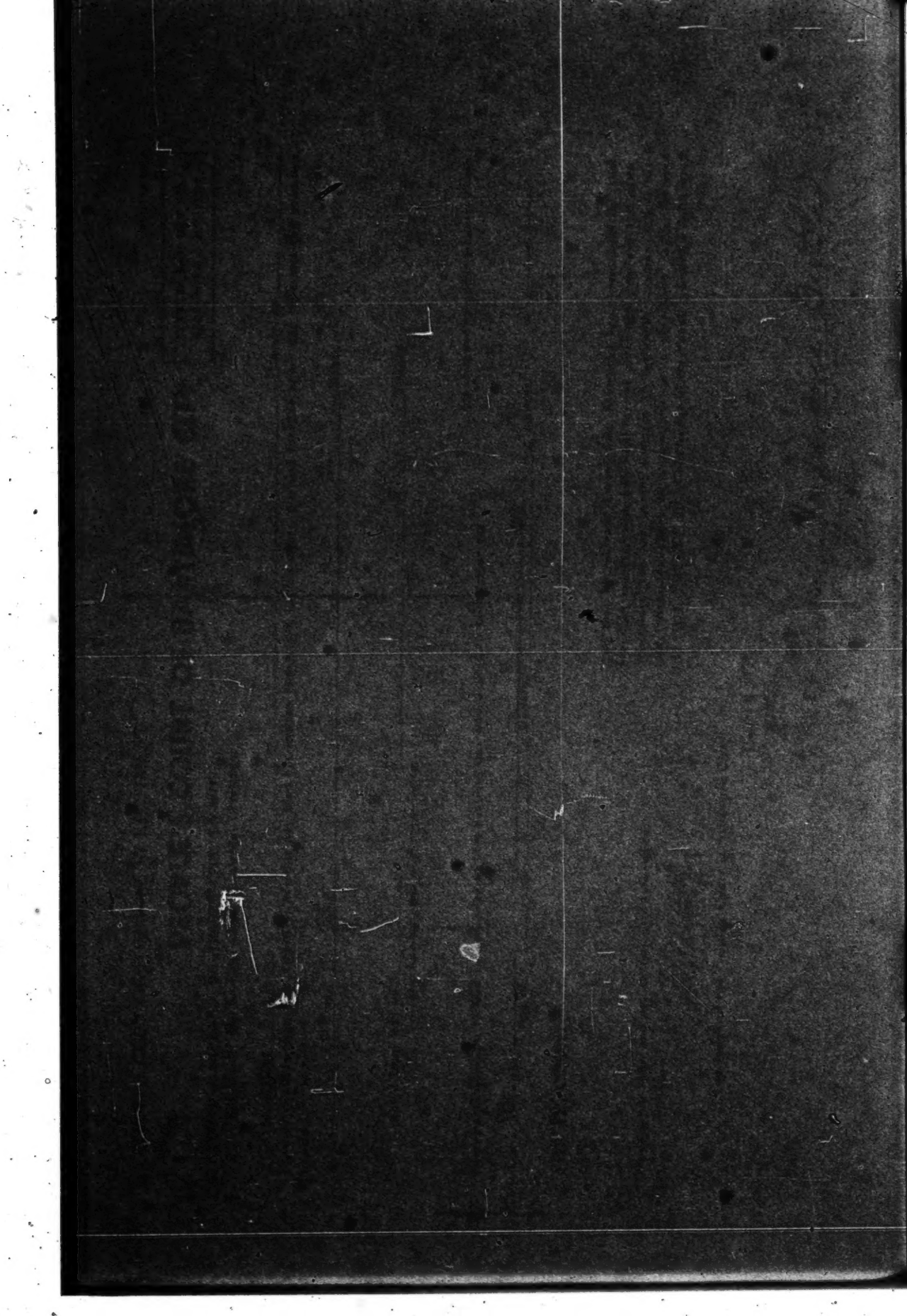
And that by warrant Lessor may have and again repossess the said premises, together with judgment for the amount of rent due and costs. Wherefore you are hereby ordered to forthwith summon and notify said tenant, assignees or under tenants to personally appear before WILLIAM T. TIPPETT, JR., Chief Judge of the People's Court of Baltimore City.

DATE: May 19 1975

Attest J. Jerome Butler
Chief Constable

2a

BEST AVAILABLE COPY



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SUPREME COURT, U.S.
Supreme Court, U.S.
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AUG 11 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated, *Appellants*,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANTS

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4 Elliot's Debates (2nd ed., 1863)	4a, 6a, 7a
"The Federalist Papers", Mentor ed. (1961) No. 78	7a, 9a
"The Federalist Papers", Mentor ed. (1961) No. 81	7a, 8a
"The Federalist Papers", Mentor ed. (1961) No. 82	7a, 8a, 9a

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"The Federalist Papers", Mentor ed. (1961) No. 84	2a
Fisher, Lead Poisoning in Children, 27 Journal of Housing, 71 (1970)	23
Foote, "The Coming Constitutional Crisis on Bail", 113 U. of Pa. L. R. 959 (1965)	
Grad, Legal Remedies for Housing Code Violations, Research Report No. 14 to the National Commission on Urban Problems (1968)	28
Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254 (1966)	28
Hobbes, Leviathan (1651) "The English Philosophers", Modern Library ed. (1939)	3a
Kelsey, "The Ninth Amendment of the Federal Constitution" 11 Ind. L. J. 309 (1936)	5a
Locke, Of Civil Government (1690) "The English Philosophers", Modern Library ed. (1939)	3a
Michelman, The Advent of a Right to Housing: A Current Appraisal, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 207 (1970)	20
Millsbough & Brechenfeld, The Human Side of Urban Renewal, IX (1960)	23
Moskovitz, Rent Withholding and the Implied Warranty of Habitability - Some New Breakthroughs, 4 Clearinghouse Rev. 49 (1970)	32
Moskovitz, Retaliatory Eviction - A New Doctrine In California, 46 Calif. State Bar J. 23 (1971)	33
New York Times, January 19, 1971	22
Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801 (1965)	28
President's Commission on Income Maintenance Programs, Background Papers (1970)	22
President's Committee on Urban Housing Report (A Decent Home)	22
Quinn & Philips, Law of Landlord-Tenant: Evolution of the Past and Guidelines for the Future, 38 Fordham L. Rev. 225 (1969)	32

	Page
Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767 (1969)	23
Sax & Hiestand, Slumlordism as a Tort, 65 Mich. L. Rev. 869 (1969)	31
Schoshinski, Remedies of the Indigent Tenant: Proposal for Change, 54 Georgetown L. Rev. 519 (1966)	31
Redlich, "Are there Certain Rights * * * Retained by the People?" 37 N.Y.U.L. Rev. 787 (1962)	
Report of the National Advisory Commission on Civil Disorders (Bantam Ed., 1968)	22
Rossiter, "1787 The Grand Convention", Mentor ed. (1966)	2a. 3a
Rossiter, "Seedtime of the Republic" (New York, 1953)	3a
Weaver, The Urban Complex (1964)	23
Willging, "Financial Barriers and Access of Indigents to the Courts", 57 Georgetown L. J. 253 (1968)	42

IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated, *Appellants*,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Oregon, dated September 10, 1970, is unreported however is reproduced in the Appendix at 72-78.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253, which authorized a direct appeal from a judgment by a three-judge district court denying an injunction restraining the enforcement of a state statute. The Court below consisted of three judges convened pursuant to 28 U.S.C. § 2281. *et seq.*, which refused to grant an injunction against Appellees. By their complaint, Appellants sought to enjoin Appellees from enforcing an Oregon

statute on the ground that such enforcement violated the equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1343, 2201, 2202 and 42 U.S.C. § 1983.

The District Court judgment was entered on September 10, 1970. Appellants' notice of appeal was filed September 14, 1970. The case was docketed in this Supreme Court at Misc. No. 6158 on November 12, 1970, at which time the Jurisdictional Statement was filed. Probable jurisdiction was noted on May 3, 1971, at which time permission was given to proceed *in forma pauperis*.

PROVISIONS OF THE UNITED STATES CONSTITUTION

First Amendment

> Freedom of religion, speech, and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

> When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment

Rights retained by people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

The state statute, the constitutionality of which is challenged is Oregon Rev. Stat. §§ 105.105, *et seq.* providing eviction procedure as follows:

FORCIBLE ENTRY AND WRONGFUL DETAINER

105.105 Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law the entry shall be made in a peaceable manner and without force.

105.110 Action for forcible entry or wrongful detainer. When a forcible entry is made upon any

premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.

105.115 Cause of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement under which he holds, or to deliver possession of the premises after being in default on payment of rent for 10 days.

(2) When the lease by its terms has expired and has not been renewed, or when the tenant or person in possession is holding from month, or year to year, and remains in possession after notice to quit as provided in ORS 105.120, or is holding contrary to any condition or covenant of the lease or is holding possession without any written lease or agreement.

105.120 Notice necessary to maintain action in certain cases; waiver of notice; effect of advance payments of rent. (1) An action for the recovery of the possession of the premises may be maintained in cases provided in subsection (2) of ORS 105.115, when the notice to terminate the tenancy or to quit has been served upon the tenant or person in possession in the manner prescribed by ORS 91.060 to 91.080 before the commencement of the action, unless the leasing or occupation is for the purpose of framing or agriculture, in which case such notice must be served for a period of 90 days before the commencement of the action.

(2) Any person entering into the possession of real estate under written lease as the tenant of

another may, but the terms of his lease, waive the giving of any notice required by this section.

(3) The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against him for the possession of the premises before the expiration of any period for which the tenant or person has paid the rent of the premises in advance.

105.125 Complaint. In an action pursuant to ORS 105.110 it is sufficient to state in the complaint:

(1) A description of the premises with convenient certainty;

(2) That the defendant is in possession of the premises;

(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

(4) That the plaintiff is entitled to the possession of the premises.

105.130 How action conducted. Except as provided in ORS 105.135 to 105.160, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

105.135 Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

105.140 Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

105.145 Judgment on trial by court. If the action is tried by the court without a jury, and after hearing the evidence it concludes that the complaint

is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable.

105.150 Verdict and judgment on trial by jury. If the action is tried by a jury and they find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, they shall render a general verdict of not guilty; if true in part, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict.

105.155 Form of execution. The execution, should judgment of restitution be rendered, may be in the following form:

STATE OF OREGON)
ss.
County of _____)

To the sheriff or any constable of the County:

Whereas, a certain action for the forcibly entry and detention, (or the forcible detention) of the following described premises, to wit: _____, lately tried before the above entitled court, wherein _____ was plaintiff and _____ was defendant, judgment was rendered on the ____ day of _____; A.D., ____, that the plaintiff _____ have restitution of the premises, and also that he recover the costs and disbursements in the sum of $_____;

In the name of the State of Oregon, you are, therefore, hereby commended to cause the defendant and his goods and chattels to be forthwith

removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and chattels of the defendant, and make the costs and disbursements, aforesaid, and all accruing costs, and to amek legal service and due return of this writ.

Witness my hand and official seal (if issued out of a court of record) this ___day of _____, A.D., _____.

Justice of the Peace, or clerk of the district or circuit court.

105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action.

QUESTIONS PRESENTED

1. Does the refusal of Oregon District Courts to hear and pass on the merits of affirmative defenses in F.E.D. actions deny appellants Equal Protection of the Laws?

2. Do Oregon Statutes requiring tenants in F.E.D. cases to prepare for trial in substantially less time than other defendants deny appellants Equal Protection of the Laws?

3. Do Oregon's restrictions on the rights of F.E.D. tenants to appeal deny appellants Equal Protection of the Laws?

4. Does Oregon's refusal to allow defendants in F.E.D. actions to raise affirmative defenses deny appellants Due Process of Law?

5. Does the Oregon statutory provision that enables an F.E.D. plaintiff to merely allege that the Defendant is "holding the premises by force" deny appellants Due Process of Law?

6. Does the Oregon statutory provision that requires an F.E.D. trial to be held within two to four days deny appellants Due Proces of Law?

7. Does the Oregon statutory provision that requires an F.E.D. defendant to post a double rent bond on appeal deny appellants Due Process of Law?

8. Does the Oregon F.E.D. procedure presenting a weighted unbalanced procedure in favor of the plaintiff deny appellants Due Process of Law?

STATEMENT OF THE CASE

Donald and Edna Lindsey represent a class of appellants including all those persons in the State of Oregon who are, have been or will be affected by the operation of Oregon's eviction law (called "forcible entry and wrongful detainer," or "F.E.D.") (A.33) Appellants as a class seek to remove the restraints imposed by Oregon's eviction law on tenants' abilities to properly defend themselves.

Appellants and the other plaintiffs in the action below are individuals who either were threatened with eviction or in fact had eviction proceedings instituted against them in the District Court of the State of Oregon for the County of Multnomah. Donald and Edna Lindsey were threatened with eviction (R. –Plaintiffs' Exhibit No. 14) allegedly because they withheld rent in an attempt to induce their

landlord appellee Normet, to repair their premises, which had been condemned by the Bureau of Building Inspection for the City of Portland, and in retaliation for their having reported code violations to the Bureau. (R. –Plaintiffs' Exhibit No. 3). Evarett Snyder was threatened with eviction under circumstances similar to the Lindseys, except that his dwelling was not condemned (A. 44-45, R. –Plaintiffs' Exhibits Nos. 15-23, 38-44 described A. 59, 61-62). Princess Thomas and Marie Dunne were threatened with eviction because they were welfare recipients (A. 49, R. –Plaintiffs' Exhibit No. 48). This action in Federal District Court was filed before F.E.D. actions could be filed in any of the above incidents.

F.E.D. actions were brought against plaintiffs Lowe and Oetting, and each attempted to raise certain affirmative defenses to their eviction action, including illegality of contract, violation of public policy, failure of consideration, constructive eviction, and unclean hands. (R. –Plaintiffs' Exhibits Nos. 1 and 2–answers filed in the State Court actions). In Oetting's eviction action, he attempted to raise these defenses through testimony at trial, but the trial judge sustained an objection by the landlord's attorney to the relevance of such testimony. (A. 50, Stip. fact No. 6). In Lowe's case, the landlord's attorney moved to strike these defenses on the ground that they were not permitted by the statute, and said motion was granted by appellee, the Honorable William C. Beers (R. –Plaintiffs' Exhibit No. 1, Motion and Order). In each of these cases, no hearing was held on the legal or factual merits of any of the defenses raised. Plaintiff Bonnie L. Colton was permitted to litigate affirmative defenses because of a stipulation between counsel and presents the sole exception to the otherwise consistent rulings of the judges of the District Court of the State of Oregon refusing to hear affirmative defenses in F.E.D. actions. (A. 50, Stip. fact nos. 7, 8; R. –Plaintiffs' Exhibit No. 47).

Appellant Lindsey's case is typical of that of other members of the class of appellants herein. Donald Lindsey resided in his home with his wife and three children. (A. 34) The condition of his home is readily evidenced by the color photographs thereof admitted into evidence. (R. –Plaintiffs' Exhibit Nos. 25-37, described A. 59-61; Transcript of Oral Argument at 50). An expert witness, Mrs. Josephine Brown, testified that "(i)n comparing it [Lindsey's residence] to other homes for low-income families, it's one of the worst I have seen that people are still living in." (R. –Plaintiffs' Exhibit No. 24 at 42). The Lindseys had been searching for a place to move for about two years but they were hindered by the fact that they did not have an automobile and by the low official vacancy rate of less than two percent with the more realistic figure of one percent actual availability. (R. –Plaintiffs' Exhibit No. 24 at 24-25). Donald Lindsey's physical condition, requiring him to spend considerable time in a wheel chair, further exacerbated his ability to search for housing (A. 34).

The substance of Mrs. Brown's testimony concerning low-income housing conditions and the types of irreparable harm caused to tenants being evicted is summarized in the Appendix at 67-70. Her deposition was admitted into evidence in this action along with all of Plaintiffs' Exhibits and is marked as Plaintiffs' Exhibit No. 24. (R. –Transcript of Oral Argument at 50).*

**E.g.* Excerpts from the deposition of Mrs. Josephine Brown, Plaintiffs' expert witness. R. - Pl. Ex. No. 24 at 42-44:

> Q. (By Mr. Clough) Okay. Assuming that the rental for this place [Lindsey residence] was one hundred dollars a month. Is this–how does this compare with the rental for other low-income rental units that you have observed?
>
> A. It's high for anything comparable.
>
> Q. Are you able to give an opinion, based on your knowledge and experience as to whether or not the Lindsey's would suffer irreparable harm if they were to be evicted from their dwelling?
>
> * * *
>
> (colloquy of counsel omitted)
>
> * * *

Oregon law is clear that the appellants have been or would have been denied the ability to raise any affirmative defense to any eviction action lodged against them.

Appellants and the other plaintiffs below filed a Civil Rights Action in the United States District Court for the District of Oregon seeking both declaratory and injustive relief, claiming that Oregon statutes violate their constitutional rights in the following particulars (A. 21-24):

(1) by not permitting the raising of affirmative defenses to an action for eviction,

(2) by not providing the tenant sufficient time in which to prepare for trial,

(3) by not requiring an F.E.D. complaint to furnish sufficient notice of the basis of the action to enable the tenant to properly defend;

THE DEPONENT: I think that it definitely would. It would be one more blow to them, and they've had a series of them.

If I might just interject in a general sense, that most low-income families have multiple problems, housing being only one of them. And anywhere along the line of these problems—there are many places along this line of these problems, they are continually buffetted and knocked into a downward spiral.

If they have bad health problems, they have more medical expenses; they lose jobs; they can't go to school—the children can't go to school. They get behind in their education.

It's—as I say, a continuing downward and tightening spiral which they find an emotional ego block to overcome. They give up hope. They have no reason for existence. But, besides that, there's the financial end of this. They just don't have money to pay for the cost of moving, if they also can't find other housing to which they can move.

Q. (By Mr. Clough) Would this reason also apply to—strike that.

If the persons who are in the category of low-income living—in low-income housing, would this same statement apply to them?

A. Yes.

Q. In general?

A. Yes, in general.

(4) by precluding recourse to an appeal, through the requirement of a double rent bond.

Joined as defendants were the landlords of the respective plaintiffs and the class of District Court judges in Oregon who carry out the challenged statutes. The Attorney General of Oregon was also served pursuant to 28 U.S.C. § 2284, but he did not appear.

The prayer for relief requested that the District Court declare the objectionable statutory procedures invalid and restrain their continued enforcement by issuing a permanent injunction against appellees.

A trial was held on the merits and judgment for the appellees was entered on September 10, 1970, and this appeal was taken.

SUMMARY OF ARGUMENT

Oregon's eviction statutes, ORS §§ 105.105 et. seq., deny tenant-defendants in Oregon both equal protection and due process of law, by depriving them of procedural rights and privileges afforded to other defendants in Oregon civil actions, and by denying them basic procedural rights needed to enable them to receive fundamentally fair hearings on their defenses. The specific provisions challenged include: (1) ORS §§ 105.110 - 105.150, which prohibit affirmative defenses, (2) ORS § 105.125, which permits the landlord to file a complaint giving inadequate notice of the basis of his claim, (3) ORS §§ 105.135 and 105.140, which require the tenant to go to trial within two to four days after receiving the summons, allowing a continuance beyond two days only if the tenant posts a "continuance bond," (4) ORS § 105.160, which permits an F.E.D. defendant to appeal only if he furnishes an undertaking, with security, for double the rental value of the premises.

In the equal protection argument, Appellants contend that there is no rational distinction between F.E.D. defend-

ants and other defendants justifying the harsh treatment of tenants, particularly since less drastic means are available to protect any legitimate purposes of the statutes. We also contend, however, that even if there were a minimally rational distinction, these statutes still deny Appellants equal protection, since a compelling governmental interest for the differing treatment must be shown, and this cannot be done. The compelling governmental interest test is applicable because these restrictions touch upon three fundamental interests of tenants: (1) a citizen's right to peaceful possession of his home, (2) his interest in obtaining decent shelter for himself and his family, and (3) his right to equal treatment in the courts in the dispensing of procedural rights and privileges.

In the due process argument, Appellants contend that the restrictions imposed by the Oregon statutes effectively prevent tenants from receiving a fair hearing on the merits of their defenses. This is contrary to a long line of cases of this Court guaranteeing the right of each citizen to access to the courts to litigate his claims and present his defenses. For the convenience of the Court, Appellants have prepared an Historical Background of the development of this right and have attached it to this brief as Appendix "A".

The District Court's decision erroneously sustained the constitutionality of the challenged F.E.D. statutes, and therefore its judgment for Appellees should be reversed.

ARGUMENT

I

OREGON'S IMPOSITION OF MORE ONEROUS RESTRICTIONS ON F.E.D. DEEENDANTS THAN ON OTHER DEFENDANTS IS NOT JUSTIFIABLE AND DENIES APPELLANTS EQUAL PROTECTION OF THE LAW.

A. The Applicable Test

This Court's method of deciding when a state is denying a class of litigants equal protection of the laws was succinctly summarized recently by the California Supreme Court in *Westbrook v. Mihaly*, 2 Cal.3d 765, 784-785, 471 P.2d 487 (1970):

> . . . [T]he United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (See *McDonald v. Board of Election* (1969) 394 U.S. 802, 809 [22 L.Ed.2d 739, 745-746, 89 S.Ct. 1404]; *McGowan v. Maryland* (1961) 366 U.S. 420, 425-426 [6 L.Ed.2d 393, 398-399, 81 S.Ct. 1101].)
>
> On the other hand, in cases involving "suspect classifications"[37] or touching on "fundamental interests,"[38] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (See *Shapiro v. Thompson, supra*, 394 U.S. 618, 638 [22 L.Ed.2d 600, 617]; *Sherbert v. Verner* (1963) 374 U.S. 398, 406 [10 L.Ed.2d 965, 971-972, 83 S.Ct. 1790]; *Skinner v. Oklahoma, supra*, 316 U.S. 535, 541 [86 L.Ed. 1655, 1660]; see also *Developments in the Law—Equal Protection* (1969) 82 Harv.L.Rev. 1064, 1120-1131.) Under the strict standard applied in such cases, the state

bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. The dual aspect of this standard is clearly formulated in the opinion of Justice Marshall, dissenting, in *Hall v. Beals* (1969) 396 U.S. 45, 52 [24 L.Ed.2d 214, 220, 90 S.Ct. 200]: '. . . once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. [Citations.]'

[37] Certain classifications, such as those based on race (*McLaughlin v. Florida* (1964) 379 U.S. 184 [13 L.Ed.2d 222, 85 S.Ct. 283]) or wealth (*Douglas v. California* (1963) 372 U.S. 353 [9 L.Ed.2d 811, 83 S.Ct. 814]), are "highly suspect" (*McDonald, supra,* at p. 807 [22 L.Ed.2d at p. 744]). 38

[38] Interests which have been identified as fundamental and therefore deserving of special treatment under the equal protection clause include procreation (*Skinner v. Oklahoma* (1942) 316 U.S. 535 [86 L.Ed. 1655, 62 S.Ct. 1110] and interstate travel (*Shapiro v. Thompson* (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322]).

It is Appellant's contention that under either the "rational relationship" test or the "compelling state interest" test, Oregon's restrictions on tenants' abilities to properly defend FED actions must fall.

In *Shapiro v. Thompson,* 394 U.S. 618 (1969), the Court held that a state's one year's residency requirement for welfare benefits was irrational. Even though the Court went on to hold that the "compelling state interest" test applied because a fundamental interest (the right of interstate travel) was involved (*id.* at 634), the Court held that there was not even a "rational relationship" between the restriction and its alleged purpose of preventing the fraudulent

receipt of benefits," for less drastic means are available, and are employed, to minimize that hazard." *Id.* at 637, 638. Similarly, as will be pointed out, less drastic means are clearly available to the Oregon courts and legislature to protect the landlord from the hazards the restrictions were supposedly intended to prevent.

Appellants contend, however, that it is unnecessary to apply the "rational basis" test here, for the restrictions imposed on Oregon tenants touch on certain matters which have long been considered by our courts and legislative bodies to be fundamental interests. We contend that three separate and distinct fundamental interests are so affected: (1) a citizen's right to retain peaceful possession of his home, (2) his interest in obtaining decent shelter for himself and his family, and (3) his right to equal treatment in our courts in the dispensing of procedural rights and privileges. If any one of these interests is found to be fundamental, then the "compelling state interest" test must be applied. See also *"Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966).

1. *The Right to Retain Peaceful Possession of One's Home is a Fundamental Interest*

This Court has long recognized and protected the individual's right to peaceful possession of his home. While the several Justices have sometimes disagreed as to how to protect this right, all have agreed that this interest is fundamental.

In *Poe v. Ullman,* 367 U.S. 497 (1961), Mr. Justice Harlan dissented from the Court's refusal to strike down Connecticut's anti-contraceptive law, stating that:

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one

explicitly granted Constitutional right. [*Id.* at 551-552.]

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Connecticut's anti-contraceptive law was declared unconstitutional, as it violated "the sanctity of a man's home and the privacies of life." *Id.* at 484. See also *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

Justices Goldberg, Warren, and Brennan concurred, citing and agreeing with the statement by Mr. Justice Harlan in *Poe v. Ullman, supra*. 381 U.S. at 495. Mr. Justice White also concurred, stating that when there was such a significant encrouchment on personal liberty, a compelling state interest must be shown. *Id.* at 504. Although Justices Black and Stewart dissented, they also expressed sentiments regarding the individual's interest in retaining possession of his property:

> But I think it belittles that Amendment [the Fourth] to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. [*Id.* at 509].

In *Frank v. Maryland*, 359 U.S. 360 (1959), the Court upheld a statute penalizing a homeowner for resisting an inspection by a city health inspector. In dissent, Justices Douglas, Warren, Black, and Brennan discussed extensively how important the protection of the home has been treated in Anglo-American law. Quoting from the elder Pitt, they stated:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the train may enter—but the King

> of England cannot enter—all his force dares not cross the threshold of the ruined tenement. [*Id.* at 378-379]

The dissenters also quoted from James Otis:

> Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet he is as well guarded as a prince in his castle. [*Id.* at 479]

Frank was overruled in *Camara v. Municipal Court*, 387 U.S. 523 (1967). The majority opinion, written by Mr. Justice White, held that a warrant must be obtained before homes are inspected.

The Court's commitment to protecting the sanctity of the home was strongly demonstrated in *Silverman v. United States*, 365 U.S. 505 (1961), where police officers had gathered evidence by use of a "spike mike" which intruded several inches into the wall of defendant's house. Mr. Justice Stewart, writing for the majority, held the evidence inadmissible, as it was obtained by "an actual intrusion into a constitutionally protected area." *Id.* at 512. The Court expressly refused to decide the case on the ground that such eavesdropping violated a constitutionally protected right of a privacy, treating as more important "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* at 511. *Cf. Rowan v. United States Post Office Department*, 397 U.S. 728, 736-738 (1970) (protection of home from private advertisers upheld).

The Court has not suggested that the interest of the householder in protecting his home is any less where he is renting than where he owns the dwelling in fee simple, and it is clear that such a distinction would have no reasonable basis. Such a distinction might remove more than one-third of our population from the protection of the cases discussed above. (The 1970 Census of Housing, Advance Report HCV 11, reports that out of a total of 68,631,428 housing units in the country, 23,554,976 are renter occupied.)

The tenant's interest in retaining possession has been recognized by courts across the country as being at least as important as the landlord's interest in protecting his investment. "The right to retain property already in possession is as sacred as the right to recover it, when dispossessed." *Mendoza v. Small Claims Court,* 49 Cal.2d 668, 672, 321 P.2d 9 (1958), quoting from *Hocking Valley Coal Co. v. Rosser,* 53 Ohio St. 12, 41 N.E. 263, 265 (1895). This right to retain possession of rented housing has been protected from: retaliation because the tenant reported code violations to a city agency (*Edwards v. Habib,* 397 F.2d 687 (D.C. Cir., 1968); *Dickhut v. Norton,* 173 N.W.2d 297 (Wis. 1970); *Portnoy v. Hill,* 294 N.Y.S.2d 278 (1968); Ill.Rev. Stat., ch. 80, § 71; N.J.Laws 1967, ch. 215; R.I.Gen.Laws Ann.§ 34-20-10; Mass. Laws Ann. ch. 186, § 18; Mich. Comp. Laws Ann. § 600.5646(4)(5); District of Columbia Housing Regulations, § 2910); retaliation because the tenant invoked a statutory "repair and deduct" remedy (*Schweiger v. Superior Court,* 3 Cal.3d 507, ___ P.2d. ___ (1970)); retaliation because the tenant engaged in tenant organizing (*Hosey v. Club Van Courtlandt,* 299 F. Supp. 501 (S.D.N.Y. 1969); *McQueen v. Druker,* 317 F. Supp. 1122, 1130 (D. Mass., 1970), affd., ___F.2d ___ (1st Cir., 1971)); eviction by a governmental agency without the opportunity for a prior hearing (*Escalera v. New York City Housing Authority,* 425 F.2d 853 (2nd Cir., 1970)); intrusion by the landlord to secure his "baggage lien" without a prior hearing (*Klim v. Jones,* 315 F. Supp. 109 (N.D. Cal. 1970); *Santiago v. McElroy,* 314 F. Supp. 284 (E.D. Pa., 1970); *Hall v. Garson,* 430 F.2d 430 (5th Cir., 1970); eviction before a full hearing on the merits of the landlord's claim and the tenant's defense (*Jordan v. Talbot,* 55 Cal.2d 597, 361 P.2d 20 (1961); *Mihans v. Municipal Court,* 7 Cal.App.3d 479, 87 Cal.Rptr. 17 (1970)); and eviction because of the tenant's race (*Abstract Investment Co. v. Hutchinson,* 204 Cal. App.2d 242, 22 Cal. Rptr. 309 (1962)). Recent cases have also recognized the rights of tenants to insist on certain guarantees provided by Congress before they may be dis-

placed from their homes by government programs. See *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir., 1968); *Western Addition Community Organization v. Weaver*, 294 F. Supp 433 (N.D. Cal, 1968); *Powelton Civic Home Owners Ass'n: v. Department of Housing and Urban Development*, 284 F. Supp. 809 (E.D. Penna., 1968).

The householder's interest is not being permanently displaced from his home might well be considered more fundamental than his interest in preventing the sporadic intrusions dealt with by this Court in the cases discussed earlier. A noted commentator stated recently:

> If a house becomes a home only through its occupants' settling in and making it so, then a society's recognition of a "right to housing" must encompass some receptivity to claims not to be involuntarily removed from housing already occupied. Acknowledgement of such claims would reflect sensitivity to the severe inconvenience of moving, including the risk of not finding substitute housing of objectively comparable quality at comparable cost. It would also reflect sensitivity to the *trauma* of being uprooted—of being torn away from a structure, surroundings, and neighborhood with which one's existence may be interpenetrated in countless important ways. I shall, accordingly, refer to the idea of special claims to retain housing which one has as a "right not to be uprooted." [Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 207, 219 (1970)].

These authorities amply demonstrate that our courts and legislatures have historically treated the right of the individual householder to retain peaceful possession of his home as a fundamental interest.

2. *The Need for Decent Shelter is a Fundamental Interest*

In recent years, this Court, the Congress, and the Executive Department have all made pronouncements emphasizing the social necessity of decent housing for each resident of our country. Thus, all three branches of government have recognized the need for decent shelter as a fundamental interest.

In the U.S. Housing Act of 1937, § 1, Congress declared it:

> to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income in urban, rural nonfarm, and Indian areas that are injurious to the health, safety, and morals of the citizens of the Nation. [42 U.S.C. § 1401].

These goals were again asserted in the Housing Act of 1949, § 1.

> The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of *the goal of a decent home and a suitable living environment for every American family*, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. [42 U.S.C. § 1441, emphasis added].

This goal was specifically reaffirmed by Congress in the Housing Act of 1968, together with the finding that the goal is not being reached, and that it can be substantially achieved within the next decade by the construction or

rehabilitation of 26 million housing units, 6 million of these for low- and moderate-income families. Similar findings and declarations were made by Congress in the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. § 3301) and the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701t).

The Executive Department has also recognized the fundamental interest in decent housing. In 1967, President Johnson described the "need . . . to provide the basic necessities of a decent home and healthy surroundings for every American family now imprisoned in the squalor of the slums" as "the most pressing unfulfilled need of our society." President's Committee on Urban Housing, Report (A Decent Home), 1. Just this year, the Secretary of the Department of Housing and Urban Development has also spoken of the national goal of providing "a decent home in a suitable living environment for every American family." New York Times, January 19, 1971, p. 49. See also President's Commission on Income Maintenance Programs, Background Papers, 337-349 (1970); Report of the National Advisory Commission on Civil Disorders 257,260 (1968).

This Court has also acknowledged the importance of decent housing on several occasions. In *Block v. Hirsh*, 256 U.S. 135 (1920), Mr. Justice Holmes, writing for the majority, stated that "Housing is a necessity of life." (*Id.* at 156). In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court spoke of "the very means to subsist—food, shelter, and other necessaries of life." (*Id.* at 627). In *Reitman v Mulkey*, 387 U.S. 369 (1967); in his concurring opinion, Mr. Justice Douglas noted that "Urban housing is clearly marked with the public interest." (*Id.* at 385). See also *Hunter v. Erickson*, 393 U.S. 385 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Other courts across the country have also recognized the need for decent housing, especially among low-income and minority people. Communities have been required to

lower restrictions on the construction of housing for low-income people and to plan for additional low-income housing. See *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Southern Alameda Span. Sp. Org. v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir., 1970); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969). Courts in several jurisdictions have recently imposed an implied warranty of habitability on the residential landlord, allowing the tenant remedies such as rent withholding and suits for damages where the warranty is substantially breached. See *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D. C. Cir., 1970) and other authorities cited in Section II B, *infra*.

The dismal effects of substandard housing on the morals and health of the occupants have been well documented. See, *e.g.*, Millsbough & Brechenfeld, *The Human Side of Urban Renewal*, IX (1960) ("[S]lums breed a hopelessness in people's hearts"); Report of the National Advisory Commission on Civil Disorders, 472 (Bantam Ed., 1968) ("open violation of [housing] codes [acts] as a constant source of distress to low-income tenents and creates serious hazards to health and safety in disadvantaged neighborhoods"); Weaver, *The Urban Complex* (1964); Fisher, *Lead Poisoning in Children*, 27 Journal of Housing, 71-75 (1970).

Thus, it has been recognized on every level that both the society at large and the resident in need have a fundamental interest in securing decent housing for each such resident.

3. *The Right to Equal Treatment In Our Courts Is a Fundamental Interest.*

The fundamental interest of a litigant in being permitted to properly defend himself in a civil lawsuit is clear. He needs adequate time to prepare his defense, the right to have his arguments heard, and the right to take available appeals to remedy improperties committed in the trial

court. Without these basic rights, the individual may be unjustly persecuted, and respect for the judicial system will quickly fade. Authorities supporting these rights are discussed extensively in the section of Appellant's brief dealing with the Due Process Clause, *infra*.

In addition, however, this Court and other courts have stressed on many occasions that a litigant not only has a fundamental interest in certain basic procedural rights in order to properly defend, he also has a fundamental interest in being afforded procedural *privileges* on an equal basis with other litigants who cannot reasonably be classified differently. "The Fourteenth Amendment . . . undoubtedly intended . . . that all persons . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances, that no greater burdens should be laid upon one than are laid upon others in the same calling and condition . . . ." *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (dictum).

In *Truax v. Corrigan*, 257 U.S. 312 (1921), the Court dealt with an Arizona statute restricting employers' actions for injunctions against striking workers using illegal tactics, while there were no such restrictions on such injunction actions generally. The Court struck down the statute, even though it found that the employer had no fundamental right to the equity relief itself:

> "It is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the Legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of

> it to another under like circumstances and in the same territorial jurisdiction. [*Id.* at 334]

In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Court reviewed New York statutes which guaranteed persons threatened with commitment to mental institutions the right to a jury trial on the issue of sanity and commitment to a civil hospital if found insane, but denied these rights to such persons nearing the end of a criminal sentence. The Court held this classification to be arbitrary and a denial of equal protection.

> The State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection clause of the Fourteenth Amendment, arbitrarily withhold it from some. [*Id.* at 111]

The Court made no finding that the rights to jury trial and civil commitment were themselves fundamental interests.

Similarly, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court held that the State of Illinois could not deny an indigent dependent the right to appeal because he could not pay for a transcript, even though it also held that there was no constitutional right to appellate review. *Id.* at 18.

The fundamental importance of equality in procedural treatment of litigants was discussed by the Court in *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897), where the appellant challenged a state statute allowing attorneys' fees to successful plaintiffs who sued railroads, without allowing a corresponding privilege to victorious railroads, and without allowing such a privilege to plaintiffs suing non-railroad defendants. The Court stated:

> The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtor. They cannot appeal to the courts as other litigants under like conditions and with like protection. [*Id.* at 153].

In striking down the statutes, the Court held:

> No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government. [*Id.* at 160]

Other courts have also insisted on strict equality of treatment of litigants in court. See, *e.g., Republic Pictures v. Kappler,* 151 F.2d 543, 547 (8th Cir., 1945) aff'd., 327 U.S. 757 (1946); *Hocking Valley Coal Co. v. Rosser,* 41 N.E. 263 (Ohio, 1893).

This fundamental interest in procedural equality is not only that of the particular litigant affected by the discrimination. It is also the fundamental interest of the judicial system itself to insist that litigants be treated equally in order to maintain the public's respect for the courts. This concern is reflected in the cases discussed above. See, *e.g., Gulf, Colorado & Santa Fe Ry. v. Ellis, supra,* 165 U.S. at 160.

These dual fundamental interests in procedural equality should require a showing of a compelling state interest before a classification depriving a class of litigants of certain procedural rights and privileges should be upheld.

B. *The Refusal Of Oregon District Courts To Hear And Pass On The Merits Of Affirmative Defenses In FED Actions Denies Appellants Equal Protection Of The Laws.*

Under ORS § 105.110, when possession of premises is unlawfully held by force, the person entitled to the premises may bring an action to recover possession in circuit court or district court. His complaint is deemed by ORS § 105.125 to be sufficient if it states (1) a description of the premises, (2) that defendant is in possession (3) that he entered with force or "unlawfully holds the premises with force," and (4) that plaintiff is entitled to possession. Under ORS § 105.115, the causes of "unlawful holding by force" are failure to pay rent or vacate within ten days

after rent is due, and termination of the tenancy by expiration of a fixed term, or service of a thirty-day notice in the case of a month-to-month tenancy. ORS §§ 105.145 and 105.150 provide that if the fact-finder concludes that the complaint is true, judgment shall be rendered for the plaintiff for restitution of the premises and costs.

Thus, these statutes on their face preclude the raising of any affirmative defenses. If the complaint alleges that the tenant failed to pay rent or vacate for tendays, or that he failed to move after expiration of the notice, and this is found to be true, the tenant is evicted. The fact that the tenant may have withheld rent because the landlord failed to perform his part of the bargain by making proper repairs, or the fact that a notice to terminate a month-to-month tenancy was served in retaliation for the tenant's having reported housing code violations to a city agency, are not only irrelevant, they are not even heard. These defenses are stricken.[1] (See complaint filed in this action, Appendix, pp. 24-26). Oregon has no similar ban on affirmative defenses applicable to civil actions in general. Appellants contend that the application of this ban only to tenants in FED actions denies them equal protection of the laws.

We emphasize that we are not here to challenge any decision of an Oregon court which rejects any of our proposal affirmative defenses on their merits, either legally or factually. We do, however, challenge the refusal of these courts to *hear* these defenses and decide them on their merits, just as they would do in any ordinary civil action.

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[1]Certain "equitable" defenses relating to title have been allowed in circuit court. *Hopka v. Forbes*, 135 Or. 91, 294 P.2d 342 (1930). Most FED cases, however, including the ones involved here, are brought in district court (pursuant to ORS § 46.060(1)(e)), which has a lower filing fee and less crowded docket. The district court jurisdictional statute appears to allow equitable defenses in district court FED actions also (see ORS § 46.060(2)), but this has not been construed to allow affirmative defenses generally.

To set aside any notion that this distinction is unimportant or that the proposed defenses are frivolous, however, we will briefly describe a few of these defenses in order to demonstrate that it is highly likely that one or more of them would be upheld, if heard.

One proposed defense asserts that because the landlord leased the premises with the contemplation that the premises would remain below the standards set by the city housing code, the lease or rental agreement is an *illegal, unenforceable contract*, on which no rent can be due, so that an FED action based upon non-payment of rent allegedly due under such a lease must fail. The Housing Code of Portland, Oregon, is typical of housing codes enacted by many communities throughout Oregon and the rest of the country.[2] Its purpose is to protect the life, health, and welfare of the general public and owners and occupants of residential buildings. (See Portland Housing Code, § 8-102, at Jurisdictional Statement, Appendix F, p. 18.) It sets out detailed requirements for maintenance and repair of property, and it forbids anyone to use or permit a building to be used in violation of its provisions. (See Portland Housing Code, § 8-204, at Jurisdictional Statement, Appendix F, p. 28.) If violations persist, the building may be ordered vacated and/or the offender may be prosecuted for a misdemeanor. (See Portland Housing Code, §§ 8-204,

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[2] As of five years ago, over 1,000 communities in the nation had enacted housing codes. Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1260, n. 19 (1966). The abysmal level of enforcement of these codes has been well documented and is now recognized as a problem of national concern. See Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L.F. 60 (1968); Grad, *Legal Remedies for Housing Code Violations*, Research Report No. 14 to the National Commission on Urban Problems (1968); Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801 (1965).

8-1001, at Jurisdictional Statement, Appendix F, pp. 18-19).[3]

It seems clear that a lease agreement renting a dwelling in violation of the Housing Code[4] would be considered an illegal, unenforceable contract[5] under Oregon law, if only this defense were allowed to be asserted in a FED case.

The criteria for determining when a contract is illegal were set out by the Oregon Supreme Court in *Uhlmann v. Kin Daw*, 97 Or. 681, 193 Pac. 435, 437-438 (1920).

> An illegal agreement does not attain to the dignity of a contract, within the meaning of the term 'contract' as legally defined, because it is void, and therefore unenforceable. The agreement is an illegal one if the taint of illegality manifests itself in the consideration or in a promise expressed in the agreement, or in the purpose to which the agreement is applied. 13 C.J. 410. An agreement is illegal if it is contrary to law, morality, or public policy. 6 R. C. L. 693. Plain examples of illegality are found in agreements made in violation of some statute; and, stating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute.
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[3]Like most housing codes, the Portland code fails to specify which maintenance and repair obligations fall on the landlord and which on the tenant. Nevertheless, since the obvious intent of such legislation is mainly to protect tenants, these codes have been interpreted to impose obligations on landlords where the defects were not wrongfully caused by tenants. See, *e.g.*, *McNally v. Ward*, 192 Cal. App.2d 871, 875, 877, 14 Cal. Rptr. 260 (1961); *Altz v. Lieberson*, 233 N.Y. 16, 19, 134 N.E. 703 (1922).

[4]The landlord's act of leasing out a substandard dwelling would be a violation of § 8-204, since he would be "permitting" the "use" or "occupancy" of the dwelling in violation of the code.

[5]A lease is treated as a contract under Oregon law. See *Wright v. Baumann*, 239 Or. 410, 398 P.2d 119, 121 (1965); *Eggen v. Wetterborg*, 193 Or. 145, 237 P.2d 970, 974 (1951); *Kuhn v. Coast to Stores*, 254 Or. 608, 461 P.2d 526, 527 (1969).

> The rule that an agreement is illegal and unenforceable if it conflicts with the provisions of a statute is not inexorable and unbending. If a statute having a penalty and a prohibition, express or implied, or only a penalty or only a prohibition, is silent and otherwise contains nothing from which the contrary is to be inferred, then an agreement which conflicts with the statute is void. However, upon finding a statute with either a penalty or a prohibition, or both, the court is not immediately debarred from further prosecution an inquiry as to whether an agreement is void and unenforceable in a court of justice.. *Harris v. Runnels*, 12 How. 79, 84, 13 L. Ed. 901. The inquiry is as to the legislative intent, and that may be ascertained, not only by an examination of the express terms of the statute, but it may also be implied from the several provisions of the enactment. Of course, if a statute expressly declares that an agreement made in contravention of it is void, then the inquiry is at an end; but, in the absence of such a declaration, the court may take the statute by its four corners and carefully consider the terms of the statute, its object, the evil it was enacted to remedy, and the effect of holding agreements in violation of it void, for the purpose of ascertaining whether it was the legislative intent to make such agreements void; and if from all these considerations it is manifest that the lawmakers had no such intention, the agreements should be held to be legal contracts and enforceable as such.

Under this test, it is apparent that where a contract cannot be performed without violating some Oregon statute which does not expressly declare such contracts to be valid in any event, the contract will be presumed to be void and unenforceable, such presumption to be overcome only by a showing that it is "manifest that the lawmakers had no such intention."[6] Oregon courts have followed the

[6]See also *Turney v. J. H. Tillman Co.*, 112 Or. 122, 228 Pac. 933, 935 (1924) ("It is only when the statute is silent, and contains nothing from which the contrary is to be inferred, that the contract is void.")

Uhlmann analysis and have voided contracts which were to be performed in violation of statute.[7]

Applying the *Uhlmann* test to the illegal renting of a substandard building, it seems clear that Oregon courts would hold such a lease agreement to be void. The Code imposes a prohibition and a penalty and is silent as to the enforceability of such leases, and there is nothing within the "four corners" of the Code to indicate that the "object" of the Code and the "evil it was enacted to remedy" would be adversely affected by not enforcing the contract. Indeed, refusing to enforce the contract should further the purpose of the Code: to induce landlords to properly maintain their property. The District of Columbia Court of Appeals ruled on this issue recently in *Brown v. Southhall Realty Company*, 237 A.2d 834 (D.C. Ct. App. 1968). Dealing with a housing code very similar to Portland's and an illegal contract doctrine very similar to *Uhlmann's*, the Court held the lease to be void and unenforceable. See also *Longenecker v. Hardin*, _____Ill.2d_____, 264 N.E.2d 878 (Ill. App. Ct., 1970). The tenant is therefore considered a tenant at will, and the landlord would have to serve a 30-day notice to terminate that tenancy. See *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. Ct. App., 1969).

A second proposed affirmative defense seeks to impose an "implied warranty of habitability" on the landlord.

In recent years, commentators have criticized courts for refusing to update feudal doctrines of *caveat emptor* to conform to the realities of the modern urban landlord-tenant relationship. See, *e.g.*, Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 Georgetown L. Rev. 519 (1966); Sax and Hiestand, *Slumlordism as a Tort*, 65

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[7]See *e.g.*, *Hunter v. Cunning*, 176 Or. 250, 154 P.2d 562 (1944), modified at 176 Or. 250, 157 P.2d 510 (1945) (contract made by unlicensed real estate broker is void); *Schramm v. Bank of California*, 143 Or. 546, 20 P.2d 1093, rehearing denied at 23 P.2d 327 (1933) (bank's pledge of assets for future debts, in violation of statute, is void).

Mich. L. Rev. 869 (1969); Quinn and Philips, *Law of Landlord-Tenant: Evolution of the Past and Guidelines for the Future*, 38 Fordham L. Rev. 225 (1969).

In response, courts in several jurisdictions have recently begun to impose an "implied warranty of habitability" on residential landlords, the standards of the warranty to be governed by local housing codes. See *Pines v. Perssion*, 14 Wis.2d 590, Ill N.W.2d 409 (1961); *Buckner v. Azulai*, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Lemle v. Breeden*, 462 P.2d 470 (Hawaii, 1969); *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir., 1970); *Sayko v. Bishop*, C.C.H. Pov. L. Rptr. ¶ 10,789 (N.Y. Dist. Ct., Nassau County, 1969); *Amanuensis, Ltd. v. Brown*, C.C.H. Pov. L. Rptr. ¶ 12,732 (N.Y. Civ. Ct., 1971); *Bonner v. Beechem*, C.C.H. Pov. L. Rptr. ¶ 11,098 (Colo. County Ct., Denver, 1970); *LeClair v. Woodward*, C.C.H. Pov. L. Rptr. ¶ 12,623 (Conn. Cir. Ct., 1970); Moskovitz, *Rent Withholding and the Implied Warranty of Habitability—Some New Breakthroughs*, 4 Clearinghouse Rev. 49 (1970).

In one of the leading cases in this field, *Javins v. First National Realty Corp., supra*, the tenant was permitted to raise the defense of breach of this implied warranty in a summary eviction action based on nonpayment of rent. The court protected the landlord from potential rent loss during litigation by compelling the tenant to pay the agreed rent into court monthly. If the tenant then proved a substantial breach of the warranty, he would not have to pay the agreed rent but only a "reasonable" rent, and thus defeat the eviction action.

A third affirmative defense asserts the doctrine of *retaliatory eviction*. Under this doctrine, where the landlord appears to properly invoke the eviction procedure but is in fact attempting to retaliate against the tenant for exercising some right protected by statute or the Constitution, the eviction cannot be allowed. This affirmative defense is now

permitted in several jurisdictions. See *Edwards v. Habib,* 397 F.2d 687 (D.C. Cir., 1968); *Dickhut v. Norton,* 173 N.W.2d 247 (Wis. 1970); *Portnoy v. Hill,* 294 N.Y.S.2d 278 (1968); *Hosey v. Club Van Cortlandt,* 299 F. Supp. 501 (S.D.N.Y. 1969); *McQueen v. Druker,* 317 F.Supp. 1122, 1130 (D. Mass., 1970), aff'd. ____ F.2d ____ (1st Cir., 1971); *Schweiger v. Superior Court,* 3 Cal.3d 507, ____P.2d ____ (1970); Moskovitz, *Retaliatory Eviction—A New Doctrine In California,* 46 Calif. State Bar J. 23 (1971).

Because the Oregon courts have refused to hear affirmative defenses in FED actions, there are presently no reported cases indicating whether or not these defenses are legally valid in Oregon.

Although the purpose of the Oregon courts in barring affirmative defenses such as these in FED cases has not been clearly articulated in any reported case, the apparent purpose of this exclusion can be discerned from the general purpose of the FED statutes: to permit the landlord to quickly recover possession of the premises in order to avoid loss of rental income during potentially lengthy litigation. See *L. B. Menefee Lumber Co. v. Abrams,* 138 Or. 263, 5 P.2d 709, 711-712 (1931); *Friedenthal v. Thompson,* 746 Or. 640, 31 P.2d 643, 645 (1934), In cases of alleged nonpayment of rent, the landlord fears that because the tenant has not paid demanded rent in the past, it is likely that he will be unable or unwilling to pay rent coming due while the case is being litigated. Until the case is concluded in the landlord's favor, he will be unable to rent the dwelling to someone else. Therefore, if the tenant is "judgment-proof," the longer the proceeding takes, the more rent the landlord stands to permanently lose. (It should be noted, however, that the restriction on defenses covers solvent tenants as well as insolvent tenants, and is thereby overinclusive and irrational.)

The Oregon legislature and courts have apparently found this purpose of protecting the landlord from potential loss to be more important than the tenant's need to present.

legitimate defenses allowed to all other defendants in Oregon civil cases. It is not necessary to question the merits of this choice to challenge the propriety of adopting such a drastic measure to effectuate that purpose. The Oregon courts have ignored possible means of protecting the landlord from potential loss during litigation *without* depriving the tenant of his right to a hearing on defenses which he should be permitted to raise. A method of resolving these conflicting interests was used in *Javins v. First National Realty Corporation, supra,* 428 F.2d 1071 (D.C. Cir., 1970). The court endorsed as "an excellent protective procedure" a requirement that the tenant raising defenses based upon code violations pay future rent into court as it becomes due. *Id.* at 1083, n. 67; *cf. Academy Spires, Inc. v. Jones,* 261 A.2d 413, 416 (N.J. Super. Ct., 1970). The court later elaborated on this procedure in *Bell v. Tsintolas Realty Company,* 430 F.2d 474 (D.C. Cir., 1970). Such a protective order may issue when the landlord, at a noticed hearing, shows need for such protection, in view of how long he has been deprived of rent, the landlord's obligations, and threats of foreclosure.

Use of such a protective order is not a novel idea. In fact, the continuance bond required by ORS § 105.140 is in effect such a protective order. In applying this provision to a tenant who requested a continuance in order to present certain "equitable" defenses in circuit court, the Oregon Supreme Court stated in *Friendenthal v. Thompson, supra,* that:

> Defendant should not object to paying the rent that accrues during the time the court permits him to remain in the premises by reason of the continuance of the action. The plaintiff should not be kept out of possession without, at least, such an assurance that the accruing rent will be paid if he wins his case. [31 P.2d at 646].

If affirmative defenses were allowed, the continuance bond requirement would probably be invoked in the majority of cases where such defenses were raised, since the tenant

would often need time to prepare for trial on this issue. (Where the tenant did not need a continuance, the court could still impose a protective order under its inherent powers, just as the court in *Javins* did.)

Because of the availability of the protective order, the blanket refusal of Oregon courts to hear affirmative defenses in FED cases only is wholly irrational, and this therefore denies tenants equal protection of the laws. Under the "rational relationship" test, this refusal does not pass muster, "for less drastic means are available, and are employed, to minimize that hazard" of rent loss to landlords during litigation of defenses which should not be denied to tenants. See *Shapiro v. Thompson*, 394 U.S. 618, 634, 637-638 (1969).

Appellants contend, however, that application of the "rational relationship" test is unnecessary. Oregon's refusal to listen to affirmative defenses in FED actions touches on all three fundamental interests discussed earlier: the right to retain possession of one's home, the need for decent shelter (insofar as certain defenses assert the landlord's failure to obey housing codes), and the interest of the tenant and the courts in equal procedural treatment for all litigants. Therefore, Oregon must show a compelling governmental interest for its restriction and that the distinctions drawn by the rule are necessary to further its purpose. See *Westbrook v. Mihaly, supra*, 2 Cal.3d 765, 784-785, 471 P.2d 487 (1970). We submit that neither requirement can be met here. Oregon can show no compelling governmental interest in preventing tenants, especially solvent tenants, from asserting their defenses, and, even if such an interest could be shown, that interest could be protected by less drastic means, so the distinction is not necessary to further the purpose of the rule.

C. *Oregon Statutes Requiring Tenants In FED Cases To Prepare For Trial In Substantially Less Time Than Other Defendants Denies Appellants Equal Protection Of the Laws.*

ORS § 15.040 allows a defendant in a civil action 10 days to file a written answer after the summons is served upon him. Once any desired discovery is completed, either party may then move to set the case for trial. The trial will take place anywhere from a few weeks to several months after the motion to set is filed, depending on how crowded the court docket is, whether a jury or court trial is requested, how long the trial is expected to take, etc. Thus, the defendant gets a minimum of several weeks to properly prepare for trial. If he desires a continuance to obtain even more time, he may obtain one on motion and for good cause shown. ORS § 17.050. The granting of the continuance may be conditional or unconditional, in the court's discretion. ORS § 17.050.

Oregon law is not so accommodating to the defendant in an FED action. ORS § 105.135 provides that service of the summons "shall be not less than two or more than four days before the day of trial appointed by the court." ORS § 105.140 allows a continuance of up to two days, but forbids a longer continuance at the request of the tenant unless the tenant gives an undertaking, with security covering "the rent that may accrue if judgment is rendered against the defendant." Under these provisions, the Oregon tenant is typically served with an FED summons on Friday, the trial having been set for Monday. If the tenant so requests, the court may in its discretion allow a one or two day continuance, setting trial for Tuesday or Wednesday. The court has discretion to grant a longer continuance only if the tenant posts his undertaking (with security in the form of cash, a corporate bond, or property) covering the amount of rent the landlord claims is owing plus any rent that may accrue before the trial can be completed. The low-income tenant who has his monthly paycheck carefully budgeted

might be able to post the rent claimed to be overdue (unless he has already paid it—in which case he will *still* have to post this security to raise the defense of payment), but it is unlikely that he will presently have the cash to post security for rent to come due later on.

The purpose of this different treatment of tenants by the Oregon legislature appears to be to protect landlords' from potential rent loss during litigation with tenants who might be insolvent or "judgment-proof." If so, the statute is arbitrarily overinclusive, since it impose these time restrictions on tenants who may not be insolvent, even though they presently do not have the extra cash to post the required security for a continuance beyond two days.

While some limitations on trial dates might be appropriate for tenants who *are* in fact insolvent, this would still not justify the outrageous time discrepancy involved here. Whereas the ordinary defendant has months to prepare his case, the typical tenant in an FED action is expected, *within one week at the most,* to perform the following tasks: find a lawyer, obtain an appointment, interview, and have the lawyer interview and subpoena witnesses, do legal research, prepare motions and other documents, and prepare for trial. While the refusal of Oregon courts to hear affirmative defenses may well limit the potential legal issues, the factual issues might still be quite complicated. If the action is brought for alleged nonpayment of rent, the issues might involve whether the rent was in fact paid or tendered, whether rent receipts are accurate, what rent was agreed to by oral agreement, was this agreement later modified, what day was the rent due (i.e., did the 10 days elapse before suit was filed), etc. If the action is brought after an alleged expiration of the term, the issues might involve what expiration date was agreed to, whether this was modified, whether a required notice of termination was served, etc. These issues require preparation, and the most diligent tenant and lawyer cannot be expected to properly deal with them in the time allowed by the Oregon statutes.

Later in this brief, we will present authorities showing that these restrictions go so far as to deny Appellants due process of law (regardless of how much time other defendants have to prepare for trial). At this point, we are contending that the restrictions are so unreasonable as to make the classification arbitrary and irrational, thereby denying Appellants equal protection vis-a-vis other defendants. While it might be reasonable to place insolvent tenants in a class requiring a time for trial preparation somewhat shorter than that applicable to defendants generally, it is not reasonable to place all tenants in a class which must prepare for trial within such a miniscule period. There is no rational relationship between the restrictions and their supposed purpose. Solvent tenants should be exempted from any restrictions, and "less drastic means" are available to protect the landlord from the loss of rent accruing during litigation with insolvent tenants. See *Shapiro v. Thompson*, 394 U.S. 618, 637-638 (1969). A limited but reasonable time period for trial preparation might be allowed, or protective orders (e.g., that future rent be paid into court as it comes due) might be issued. See *Javins v. First National Realty Corporation, supra*, 428 F.2d 1071, 1083, n. 67.

Again, however, we contend that it is unnecessary to apply the "rational relationship" test. Oregon's restrictions touch on two of the tenant's fundamental interests, his right to retain possession of his home and his (and the courts) interest in equal treatment for all litigants in procedural matters. Therefore, Oregon must show a compelling governmental interest in maintaining these restrictions and that they are necessary to further the purpose of the distinction. See *Westbrook v. Mihaly, supra*, 2 Cal. 3d 765, 784-785, 471 P.2d 487 (1970). No compelling governmental interest is present here. The State of Oregon has no compelling interest in forcing tenants to go to trial without adequate preparation, and, to the extent the state has an interest in protecting landlords from rent loss during litigation with insolvent tenants, this can be done by less drastic means. These harsh restrictions are not necessary.

D. Oregon's Restrictions On The Rights of FED Tenants To Appeal Denies Appellants Equal Protection of the Laws.

ORS § 19.040 provides that in order to appeal, the *ordinary litigant* in Oregon must file an undertaking, with one or more sureties, covering "all damages, costs, and disbursements which may be awarded against him on the appeal." In order for the appellant to obtain a stay of execution during the appeal, the undertaking must also provide: (1) if the judgment is for the recovery of money or personal property or the value thereof, that the appellant will satisfy it if he loses the appeal, (2) if the judgment is for the recovery of possession of real property, for a partition, or foreclosure of a lien thereon, that during his possession the appellant w will not commit waste and that if he loses the appeal he loses the appeal he will pay the value of the use of the property during the appeal.

ORS § 105.160 provides that if a *tenant in an FED action* wishes to appeal, he must give, "*in addition* to the undertaking now required by law upon appeal," an undertaking with *two* sureties for the payment of *twice* the rental value of the premises "from the commencement of the action in which the judgment is rendered until final judgment in the action."

Let us examine two defendants, each being sued in Oregon only for the recovery of his home. The first suit is based on foreclosure of an alleged lien. If this defendant loses on the trial court level and wishes to appeal, he must file an undertaking, with one surety, promising to pay any damages and costs which may be awarded against him on appeal. Since no damages were involved, this undertaking will be minimal. If he also wishes a stay of execution, his undertaking must also contain a promise not to commit waste and agree to pay the value of the premises during the appeal if he loses. This will probably amount to the rental value of the property during the likely length of time it will take for the appeal to be completed. Now let us look

at the second defendant. He is a tenant who lost a FED action on the trial level. In order to appeal and get a stay of execution, he must do everything the first defendant did. *In addition,* however, he must do the following: (1) find two sureties instead of one, (2) guarantee the rental value since the commencement of the action, not just during the appeal, and (3) guarantee *twice* that rental value, not just its amount.

While it would seem to be quite difficult to find any rational basis for this different treatment, the Oregon Supreme Court made the attempt in *Scales v. Spencer,* 246 Or. Ill, 424 P.2d 242 (1967):

> Inasmuch as a final judgment for restitution could not include a judgment for rent pending appeal it appears obvious that the legislative purpose for requiring this particular bond on appeal was to guarantee that the rent pending an appeal would be paid. That the bond must provide for double the rental value was, no doubt, intended to prevent frivolous appeals for the purpose of delay. If there were not some added cost or restriction every ousted tenant would appeal, regardless of the justification. It can also be assumed that the additional payment would compensate for waste or is in lien of damages for the unlawful holding over. Since there is a legitimate purpose for the classification made by the statute, its constitutional validity is secure. [*Id.* at 243].

These attributed purposes and their validity should be carefully examined. First, the court stated that the "obvious purpose" of this particular bond requirement is to guarantee that the rent would be paid during the appeal. The court overlooked the fact that the general appeal statute court overlooked the fact that the general appeal statute (ORS § 19.040(b)) already gives the landlord this protection, and it fails to explain why, to achieve this purpose, it is necessary to require the bond to cover rent "from the commencement of the action." Second, the court explains the double rent feature as intended to prevent frivolous

appeals, for if there were not "some added cost or restriction," every ousted tenant would appeal, regardless of justification. It maybe seriously questioned whether such a purpose (if in fact intended by the Legislature) would be a valid one. This Court has on several occasions stressed that determinations as to whether certain appeals are frivolous must be done on an individual basis, looking at the record in each case, rather than condoning the blanket type of penalty attributed by the Oregon court to the Oregon statute. See *Coppedge v. United States,* 369 U.S. 433, 446 (1962); *Ellis v. United States,* 356 U.S. 674, 675 (1958). Thirdly, the court assumed that the additional payment serves as compensation for the landlord for waste or damages. As for such waste or damages occurring during the appeal, the landlord is already protected by the undertaking the tenant must file (if he wants to remain in possession) under the general appeal statute, ORS § 19.040(b). As for possible waste or damage occurring earlier, allowing compensation through the mechanism of a double rent bond would clearly deny the tenant due process of law as to the extra amount. He may have committed no waste and caused no damage. Even if such waste or damage were alleged by the landlord, the tenant would have had no hearing on the truth of the allegations. Also, there is no conceivable rational relationship between a purpose of compensating *some* landlords for waste or damages and giving *every* landlord double rent, no more and no less.

For the moment, however, let us assume that the Oregon Supreme Court was correct in each of its statements. Does not each of these statements apply equally to the defendant whose lien was foreclosed? Should not he have to pay for the value of the premises during the appeal? Is not he just as likely or not likely to file a frivolous appeal? Is not he just as likely to have committed waste on the property? No rational distinction can be made between him and the FED defendant, none was suggested by the Oregon Supreme Court.

There is no rational basis for the special restrictions placed on the FED tenant's right to appeal by ORS § 105.160, and to the extent that the concerns expressed by the Oregon Supreme Court are legitimate and are not already covered by ORS § 19.040, they can be dealt with by "less drastic means." *Shapiro v. Thompson, supra,* 394 U.S. 618, 637-638 (1969). The court may penalize specific parties or attorneys who are found to have taken frivolous appeals. Landlords can be compensated for provable waste or damages in separate actions or hearings.

In any event, we contend here, as before, that it is unnecessary to apply the "rational relationship" test. Oregon's restrictions on the tenant's right to appeal touch on two fundamental interests, the tenant's right to retain peaceful possession of his home and his and the courts' interest in equal procedural treatment for all litigants. This restriction also involves a "suspect classification," one based upon wealth, since only relatively wealthy appellants can afford the security needed to post the double rent bond. See *McDonald v. Board of Election,* 394 U.S. 802, 809 (1969); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); *Douglas v. California,* 372 U.S. 353 (1963). See also *Williams v. Shaffer,* 355 U.S. 1037 (1967) (Douglas, J., dissenting); *Lee v. Habib,* 424 F.2d 891 (D.C. Cir., 1970).[8] Therefore, the state must show a compelling state interest for the restrictions and that the distinction between FED tenants and other defendants makes the restrictions necessary. This cannot be done.

[8] *C.F. Also, Harmon v. Forsenius,* 380 U.S. 528 (1965) *Pasquarella v. Santos,* 416 F.2d 436 (1st Cir., 1969); *Lee v. Habib,* 424 F.2d 891 (D.C. Cir., 1970). For state court cases, *see e.g., Suber v. Suber,* 38 U.S.L.W. 2169 (N.J. Super, Ct., 1969); *Jeffreys v. Jeffreys,* 296 N.Y.S. 2d 74 (Sup. Ct., 1968); *O'Connor v. Matzdorff* 458 P.2d 154 (Wash., 1969); *Munkelwitz v. Hennepin Co. Welfare,* 159 N.W. 2d 402 (Minn., 1968); *Chambers v. Dist. Ct. of Dubuque Cty.,* 152 N.W. 2d 818 (Iowa, 1967). *See generally,* T. Willging, "Financial Barriers and Access of Indigents to the Courts," 57 Georgetown L.J. 253, 270 (1968); *Developments in the Law–Equal Protection,* 82 Harv. L. Rev. 1065 (1969).

II

OREGON'S RESTRICTIONS ON A TENANT'S ABILITY TO DEFEND AND APPEAL IN F.E.D. ACTIONS DENIES APPELLANTS DUE PROCESS OF LAW.

A. Recent Decisions of this Court establish that the right of effective access to the courts is protected by the Due Process Clause.

The issues of this appeal are broadly categorized as involving the right of access to the State Judicial structure to resolve disputes between the State's citizens *inter se.* The access question raises at least three distinct categories of potential constitutional infirmities each requiring independent consideration. Indigents may be denied access to the courts by the requirement of docket fees or the prepayment of costs. They may be deprived of access to the courts by the imposition of unreasonable continuance or appeal bonds. Lastly, they may be denied a meaningful forum where they may assert their claims for relief. This latter category by far the more subtle form of deprivation of meaningful access is not limited to indigents, and includes the denial or limitation of defenses, adequacy of time to prepare a defense, lack of a fair trial generally, and the deprivation of a single forum to raise their claim without being faced with the requirement of filing separate lawsuits to vindicate their rights.

Recent cases strongly suggest that this appeal is but another in a line of cases developing and clarifying procedural due process of law and its corresponding imposition of duties on the States, setting forth guidelines in the relationships of the States and their citizens and the State's citizens *inter se* when private disputes arise resulting in recourse to the State judicial structure. See *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969) (State provision of remedy of wage attachment without a prior hearing in debtor-creditor relationship held invalid.); *Goldberg v. Kelley*, 397 U.S. 254 (1970) (state Welfare Dept. held to

be required to provide fair hearings before terminating welfare grants); *Wisconsin v. Constantineau*, ____U.S.____, 39 U.S.L.W. 4128 (1971) (held, an individual has a right to a prior hearing before a State brands him a public drunk by posting notices in taverns); *Boddie v. Connecticut*, ____U.S. ____, 39 U.S.L.W. 4294 (1971) (held, State must provide free access to State courts by waiving filing fees in divorce cases if persons are indigent); *Bell v. Burson*, ____U.S.____, 39 U.S.L.W. 4607 (1971) (State provision to protect potential recovery in automobile accident negligence cases through requirement of posting evidence of financial responsibility held invalid without a hearing on likelihood of liability).

Each of these cases guarantees the fundamental right of meaningful access to the courts that is protected by the procedural due process safeguards of the Fifth and Fourteenth Amendments. *See generally* Brief Appendix "A", Section I.

The due process clause of the Fifth Amendment found its origins in chapter 29 of the Magna Charta, and has been described as "intend(ing) to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819). The famous quotation of Daniel Webster in his argument in *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819) clearly sets the context in which due process cases have been considered. See *e.g. Hovey v. Elliott*, 167 U.S. 409, 418 (1897).

> By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.

Dartmouth College Case, supra at 582. It is clear that the government has a duty to provide access to the courts and afford due process of law to its litigants. As summarized by John Marshall in *Marbury v. Madison*, 1 Cranch 137, 163 (1803):

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford that protection.

Quoting 3 Blackstone's Commentaries 23, he went on to say:

> . . . 'it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.' *Ibid.*

Respect in and confidence of the courts are prerequisites for the success of our form of government. The courts' arbitration and enforcement of rights is the very foundation underlying whatever rights may be considered "valuable" in our society. See *Meltzer v. LeCraw*, ____U.S.____, 39 U.S.L.W. 3483 (Black, J., dissenting).

Generally "(t)he article [Fifth Amendment] is a restraint on the legislature, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law', by its mere will." *Den v. Hoboken Land Co.*, 18 How. 272, 276 (1855). This imposes the highest degree of trust in the courts since it is for them to determine the independent considerations of due process of law. *Grannis v. Ordean*, 234 U.S. 385 (1914). In that determination they are "governed by the substance of things and not by mere form." *Simon v. Craft*, 182 U.S. 427, 436 (1901).

The long line of cases concerning service of process and adequacy of notice present a recurring theme of the protection of due process of law, that no person shall be condemned in his property without notice and opportunity to defend. See *e.g. Armstrong v. Manzo*, 380 U.S. 545 (1965); *Covey v. Town of Sommers*, 351 U.S. 141 (1956); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).[9]

[9] *See also Milliken v. Meyer*, 311 U.S. 457 (1940); *Louisville Nashville R.R. Co. v. Schmidt*, 177 U.S. 230 (1900); *Iowa Central Ry Co. v. Iowa*, 160 U.S. 389 (1896); *Earle v. McVeigh*, 91 U.S. 503 (1876);

Although the foregoing list combines Fifth Amendment cases and Fourteenth Amendment cases, the considerations are identical. Generally *see Malloy v. Hogan*, 378 U.S. 1 (1964). The principles apply as well to administrative hearings,[10] and the analogy from criminal cases is clear.[11]

This court long ago settled the question that the right of all people to use the courts of a state is guaranteed by the privileges and immunities clause of the Fourteenth Amendment. *E.g. Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907).[12] In settling this question this Court has unequivocally stated that,

> The right to sue and defend in the Courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. *It is one of the highest and most essential privileges of citizenship. . . . Chambers v. Balt. & Ohio R.R., supra* at 148. (Emphasis supplied.)

Implicit in the right to sue is the right to assert a competent and complete defense to a suit.

Notwithstanding the fact that issue characterization has led to the handling of some access questions in the language of privileges and immunities (see, *e.g., Chambers v. Baltimore & Ohio, supra*) or equal protection (see, *e.g., cf. Grif-*

Ray v. Norseworthy, 23 Wall. 128 (1875); *Galpin v. Page*, 18 Wall, 350 (1874); *Baldwin v. Hale*, 1 Wall. 223 (1863); *Boswell v. Otis*, 9 How. 336 (1850); *The Mary*, 9 Cranch 126 (1815).

[10] *Kelley v. Wyman*, 294 F. Supp. 893, affirmed *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Willner v. Committee on Fitness*, 373 U.S. 96 (1963).

[11] *Cf. In re Gault*, 387 U.S. 1 (1967); *Gonzales v. United States*, 348 U.S. 407 (1955); *In re Oliver*, 333 U.S. 257 (1948); *Morgan v. United States*, 304 U.S. 1 (1938).

[12] *See also Blake v. McClung*, 172 U.S. 239 (1898); *Cole v. Cunningham*, 133 U.S. 107 (1890); *Ward v. Maryland*, 12 Wall. 418 (1871).

fin v. Illinois, 351 U.S. 12 (1956)), a fundamental due process right guarantees the result regardless of the semantics employed. *Cf. In re Gault, supra; In re Winship,* 396 U.S. 885 (1970).

It should be again emphasized that this appeal does not seek to have this Court determine the substantive rights of the parties. That is correctly the province of the state tribunals, however,

> . . . while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464, 475-6.
>
> *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 682 (1930).

The inescapable conclusion to be drawn from the foregoing is that due process requirements pervade all types of proceedings of a judicial nature regardless of the substantive law. It may be truly said that where procedural due process is concerned justice is not only blind but the scale she carries has two pans not one. Due process, therefore, determines what procedural safeguards are appropriate to protect the fundamental right of meaningful access to the civil courts in all types of litigation.

B. Oregon's refusal to allow defendants in F.E.D. to raise affirmative defenses denies appellants Due Process of Law.

It should be stressed at the outset that no affirmative defenses are heard by the Oregon Courts on the merits. Appellants do not seek to determine the merits of these potential defenses in this appeal. They merely assert that

they have the right to at least raise all potential defenses and have a hearing and argument on the merits in the state court structure.

Although the plaintiff in an eviction action may not recover back rent in that action, he may levy upon the goods of the tenant to recover the costs and disbursements of the suit.[13] Oregon Rev. Stat. § 105.155. If the tenant is unable to present all his defenses to an eviction action it will result not only in his being evicted but also in potential execution and sale of some of his property in violation of due process of law. *Sniadach v. Family Finance Co., supra; Bell v. Burson, supra.* The tenant's interest in the leasehold itself, of course, is also protected by the Due Process Clause. See discussion in Section I A (1).

The blanket denial of the ability to raise substantive and constitutional defenses *per se* is an unconstitutional deprivation of due process of law violative of the Fourteenth Amendment. The statute on its face preludes the raising of defenses other than technical ones. See discussion in Section I B., *supra.* Appellants contend that since the denial of ability to raise substantive and constitutional defenses is absolute by the language of the statute, it is an unconstitutional deprivation of due process of law. The long life of cases cited *supra* concerning service of process and adequacy of notice consistently reflect that there should be an opportunity to defend afforded to every defendant. It is the scope of that opportunity to defend that is at issue herein.

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[13] In Oregon a landlord may join a cause of action for the recovery of rent due, however, the causes are severed and the action for recovery of rent proceeds as any other lawsuit. *Compare* Oregon Rev. Stat. §§ 16.220 (1) (i), *and* 91.220. As a practical matter, however, once the tenant's property is in the hands of the landlord, the landlord could easily exercise his right of landlord's lien pursuant to Oregon Rev. Stat. § 87.535, et seq. These latter two points are not involved in this appeal but are mentioned solely to place the tenant's position in context.

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without having him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876).

Due process requires that there be an opportunity to present every available defense. *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932). *Cf. Poindexter v. Greenhow*, 114 U.S. 270, 294-295 (1885); *Osborn v. Bank of United States*, 9 Wheat. 738, 858 (1824).

Although this general rule may be qualified by procedural requirements, it presupposes that all defenses will, in fact be considered at trial or upon appellate review before any order becomes effective. *Opp Cotton Mills v. Dept. of Labor*, 312 U.S. 126, 153 (1941); *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 234 (1938); *York v. Texas*, 137 U.S. 15, 20 (1890). See also *American Surety Co. v. Baldwin, supra.*[14]

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[14] *Cf. Bianchi v. Morales*, 262 U.S. 170 (1923); *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133 (1915). These cases uphold state restrictions on the defendant's ability to question title in a possessory action. In *Grant Timber*, for example, plaintiff was in possession of timberland which defendant invaded. Plaintiff sued for possession and damages, and defendant attempted to contest plaintiff's title. The Court upheld the state's prohibition of this defense, as "The state is within its constitutional power when it limits the sphere of self help." (*Id.* at 135). We do not question this doctrine, but invoke it. The Oregon tenant takes possession with the landlord's consent and maintains it as his home. When the landlord wishes to evict, he merely brings an FED action. With its restrictions on the tenant's ability to defend, this action amounts to little more than self-help, with state sanction.

Appellants have not asserted any affirmative defense challenging the landlord's title and do not claim a constitutional right to do so.

Clearly the legislature may provide for summary procedures consistent with the principles of due process. *Sniadach v. Family Finance Co., supra.* See *Hurwitz v. North, supra* at 42. However, the right to a hearing is one of the " 'rudiments of fair play' " and such a fundamental right cannot be compromised on the grounds of convenience or expediency. *Ohio Bell Telegraph Co. v. P.U.C.*, 301 U.S. 292, 304-305 (1937).

1. *These Statutory Restrictions Unduly Invade the Province of the Judiciary*

In so providing summary procedures, the legislature cannot invade the province of the judiciary, since such invasion would violate the very essence of our system of government. *See Calder v. Bull*, 3 Dall. 386 (1798). *C.f. United States v. Yale Todd*, 14 L.Ed. 47 (1794) (not officially reported); *Hayburn's Case*, 2 Dall. 409 (1792); *United States v. Ferreira*, 13 How. 40 (1851). See generally Brief Appendix "A", Sections II, V. Appellants contend that a statute limiting and denying a defendant's ability to raise any substantive defenses invades the province of the judiciary. The Oregon statutory scheme clearly does this. The judiciary by its nature must be free to determine what is or is not a valid defense to an action for eviction upon due consideration of the law. The denial of this freedom to the judiciary presents a statute repugnant to the principles of the social compact theory upon which our government was founded. *See Calder v. Bull, supra; McVeigh v. U.S.*, 11 Wall. 259 (1871); *Windsor v. McVeigh*, 93 U.S. 274 (1876). See generally Brief Appendix "A", Section II.

Calder v. Bull, supra, answered an essentially due process question concerning a legislative grant of a new trial in a specific case. In *Calder* the Court did not specifically declare the statute in question unconstitutional since there was no necessity to do so; however, it was manifestly clear from the language of the opinion that if the facts had been different the statute would have been declared unconstitu-

tional as repugnant to the principles of social compact regarding the separation of powers and functions of the branches of the government.

This reasoning was subsequently recognized in the due process context in *McVeigh v. U.S., supra,* at 267, where the Court in a libel action held that the striking of the respondent's answer and denying him a hearing because he was an alien enemy (rebel in the Civil War) violated the just principles of the social compact citing *Calder v. Bull, supra.* This language in *McVeigh v. U.S., supra* at 267 was, in turn quoted in *Windsor v. McVeigh, supra* at 277 to answer a similar set of facts in a state court libel context for the confiscation of properties held by rebels. *Windsor v. McVeigh, supra,* in turn, was the lead citation for the basic due process proposition that a defendant has a right to be given a meaningful opportunity to be heard in *Boddie v. Connecticut, supra* at 4295. The due process safeguards, therefore, are directly traceable to the principles of social compact upon which our Constitution was founded. They protect appellants from a denial of the ability to raise defenses by the legislature (*cf. Poindexter v. Greenhow, supra*) or by the courts, (*Hovey v. Elliott, supra; Windsor v. McVeigh, supra*).

Analogous situations have arisen in the denial of ability to raise defenses to a cause of action because the defendant was a rebel, *Windsor v. McVeigh, supra; McVeigh v. U.S., supra* or in contempt of court, *Hovey v. Elliott, supra,* and in the confiscation cases where it was unsuccessfully asserted that the nature of the proceeding precluded the assertion of the defense of the President's pardon or anmesty of the owners. See *e.g., Armstrong's Foundry v. U.S.*, 6 Wall. 766 (1868); the *St. Louis Street Foundry v. U.S.*, 6 Wall. 770 (1868).[15]

[15] Analogy may also be drawn to the criminal cases involving possession of drugs or presence at stills to be sufficient to sustain a conviction for the crime charged. *E.g. United States v. Gainey,* 380 U.S. 63 (1965). See generally, *Turner v. United States,* 396 U.S. 398, 403-

2. *Preservation of the Supreme Court's Appellate Jurisdiction Requires That Defendants be Permitted to Raise Substantive Defenses*

The Supreme Court clearly has appellate jurisdiction to review constitutional claims litigated through the state court structure, such as the affirmative defense of retaliatory eviction. *See, e.g., Hosey v. Club Van Courtlandt*, 299 F. Supp. 501 (S.D. N.Y., 1969); *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass., 1970), aff'd. ____ F.2d. ____ (1st Cir., 1971); *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962). In order that these and similar issues may not be subverted; thereby frustrating this Court's appellate jurisdiction, a defendant has a right to present all of his potential defenses, making a record on

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405 (1970); *Leary v. United States*, 395 U.S. 6, 35-39 (1969). In *Gainey, supra*, this Court upheld the conviction of a person found in the presence of an illegal distillery operation. It was held that the statutory presumption was valid since it did not require the trial judge to charge the jury that the mere presence required conviction. *Gainey, supra* at 68-70. Justice Black's dissent *Gainey, supra* at 74, 79-80 went through the rationale used to determine the constitutional validity of such presumptions. First the presumption must have a rational connection between the inference drawn and the facts proved by relevant, competent evidence. Secondly, even if rationality is established, the presumption cannot operate to deprive the accused of a constitutional right. In *Gainey*, the majority opinion did not feel that the accused was denied a constitutional right.

In drawing this analogy it is important to note that in spite of the presumption, the trial judge was never required to direct a verdict based upon the presumption. In the instant appeal the trial judge is directed to enter judgment. Traditional to our system of justice is the ability to urge change in the law. Although appellants recognize that the legislature may declare or define the substantive rights of the parties, the legislature cannot lock in the procedure of the courts to prohibit the flexibility to argue change in the law in individual cases as they may arise. Otherwise such provisions would violate not only the principles of due process but also the First Amendment right to petition the court for redress of grievances. *See e.g. United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967).

the merits, for the purposes of appeal.[16] *General Oil Co. v. Crain*, 209 U.S. 211, 227-228 (1908). Appellants contend that to preserve the jurisdiction of this Court, state courts have an obligation to provide a meaningful forum for the resolution of disputes among its citizens *inter se*. See generally Brief Appendix "A", Sections V, VI.

The State courts have a concurrent duty to the people to provide a meaningful forum for the vindication of all their citizens' substantive rights. *Cf. Claflin v. Houseman*, 93 U.S. 130, 136-143 (1876); *Robb v. Connolly*, 111 U.S. 624, 636-639 (1884). For the forums to be meaningful they must incorporate the safeguards of due process of law.[17]

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[16] At a minimum the denial of ability to raise defenses asserting Constitutional safeguards is clearly a denial of due process. *E.g.*, racial discrimination, *Prendergast v. Snyder (Reitman v. Mulkey)*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 344 U.S. 1 (1948); *Abstract Investment Co. v. Hutchinson*, 204 Cal. App.2d 242, 22 Cal. Rptr. 309 (1962); exercise of first amendment rights, *Edwards v. Habib*, 397 F.2d 687 (CADC, 1968) (dictum). This proposition is consistent with the theory that the state courts have a concurrent obligation to protect and vindicate Constitutional rights with a corresponding duty to provide a meaningful forum.

[17] *See* and *compare Poindexter v. Greenhow, supra; and General Oil Co. v. Crain*, 209 U.S. 211, 227-228 (1908) (Supreme Court has power of review over Constitutional issues raised where statute attacked on its face or in manner of application. In order to demonstrate the constitutional infirmity, inquiries of fact best settled in an inferior tribunal may be necessary, reflecting the necessity for a meaningful forum in state court structures to resolve issues of fact to preserve appellate jurisdiction of Supreme Court.); *Ward v. Love County*, 253 U.S. 17, 22-23 (1920) (Supreme Court has the power to look to the substance of non-federal grounds upon which State Supreme Court bases its decision to determine whether or not they are tenable. If not, the Supreme Court may then proceed to resolve the Constitutional issues raised, thereby preserving their jurisdiction.); *Iowa-Des Moines Nat'l. Bank v. Bennett*, 284 U.S. 239, 246-247 (1931) (Supreme Court held that petitioners did not have obligation to sue the State to compel exaction of taxes equally if taxes were exacted on an unequal basis. It was held that they were not limited in their choice of forums, and could recover excess taxes in an affirm-

When a statute is constitutionally assaulted on its face, there may be the necessity of preservation of an adequate

ative suit, reversing the State Supreme Court decision that their only means of redress was an action to compel equal exaction of the tax assessed.). For the criminal analogy, *see* and *compare Ex parte Young*, 209 U.S. 123, 145-148 (1908) (Supreme Court sustained Federal jurisdiction to review State Statute. Statute held unconstitutional which, through imposition of stiff penalties, effectively denied appellants a hearing by indirection. State asserted alternative route of disobeying the law and appealing its validity in defensive posture.); *and Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336-338 (1920) (A variation of *Ex Parte Young, supra.* Supreme Court noted subsequent change of law in the State to provide for appellate review of rate schedules to State Supreme Court. Supreme Court reversed and remanded the case for further consideration to provide a complete remedy since jurisdiction in the Federal courts in the first instance was established.); *and Reisman v. Caplin*, 375 U.S. 440, 450 (1964) (Supreme Court held that provisions for pre-contempt review of refusal of accountants to testify in federal tax enforcement proceedings were sufficient to obviate issues raised by appellants that their rights would be deprived as in *Ex Parte Young, supra* and *Oklahoma Operating Co. v. Love, supra.*) *Compare also* 28 U.S.C. § 2283; *Younger v. Harris*, _____ U.S. _____, 39 U.S.L.W. 4201 (1971) *and* the recent abstention cases of *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Samuels v. Mackel*, _____ U.S. _____, 39 U.S.L.W. 4211 (1971). For example, 28 U.S.C. § 2283 and the doctrine of abstention presuppose that the State forum will be meaningfully adequate to frame and determine the issues. These vehicles to avoid Federal inquiry make little sense unless the duty to provide meaningful forum is clearly expressed as applying to the States. *Compare* also with the foregoing, the doctrine of exhaustion of state remedies which also "presupposes that some adequate state remedy exists" *Young v. Ragen*, 337 U.S. 235, 238-239 (1949), and the present statutory codification of the exhaustion doctrine in Federal Habeas Corpus relief. 28 U.S.C. § 2254(b) (Supp. II, 1966). The ever expanding list of special circumstances to obviate the exhaustion requirement argue strongly that the states must be advised of their duty to provide meaningful forums. *E.g. Ex parte Royall*, 117 U.S. 241 (1886); *Darr v. Buford*, 339 U.S. 200, 210 (1950); *In re Shuttlesworth*, 369 U.S. 35 (1962). Particular note should also be made of the purpose of 28 U.S.C. § 1651 which permits the Supreme Court to issue all writs necessary or appropriate in aid of its jurisdiction.

The logic of the doctrine of abstention traces its history in context with the effort to preserve the right to a jury trial. It was an extrapolation of the equity maxim that equity will not act when

and meaningful forum to ascertain the true state of the facts to place the constitutional issues in focus. When a statute or procedure is attacked as applied or when there is a claim of a subtle deprivation of a constitutional right, the necessity for a meaningful forum is absolute. The Supreme Court cannot, because of its volume of cases and limited manpower, become the trial court to establish the veracity of the facts in the first instance. The ability to develop a record from which an appeal may be taken is mandatory to preserve the Supreme Court's jurisdiction. This factor was noted in *General Oil Co. v. Crain, supra.* It would be perhaps desirable if that right could cleanly be applied to cases involving constitutional issues, however, such issues do not conveniently arise clearly at the inception of a lawsuit. They may not arise until the trial is well under way or the case is on appeal. Therefore, to cover all potential situations, the state courts necessarily must provide a meaningful forum for all substantive issues. The latter is analogous to *Love v. Ward Co.*, 253 U.S. 17, 22-23

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there is an adequate remedy at law. (This background was developed in the primary brief on the merits. Record at 66-82). In the Federal context, the adequate remedy at law may be in the state courts or in the Federal courts, hence the judge-made concept that the Federal courts will not act when there is an adequate remedy at state law. Sometimes abused and confused over the passage of time and obfuscated by the merger of law and equity, Abstention finds its true background in this underlying logic concerning preservation of the right to a jury trial. This same logic has equal application to the fraternal statutory concepts of the doctrine of exhaustion of state remedies, 28 U.S.C. § 2254(b), and the anti-injunction statute 28 U.S.C. §2283. The "anti-injunction" statute has been described as the legacy of our federalism. However, since our Forefathers considered the Federal Judiciary as the primary bastion of Federal Constitutional rights, the *only* way that this provision is justifiable as that "legacy" is if the states have a duty to provide a meaningful forum for the resolution of disputes. All three concepts presuppose that there will be a constitutionally adequate forum for the resolution of disputes within the state court structure, preserving thereby the appellate jurisdiction of the United States Supreme Court to review constitutional issues.

(1920), which demonstrates the extent to which the Supreme Court may go to preserve its jurisdiction. Clearly, if there is no trial record or no trial from which the facts may be ascertained, it would frustrate or at least seriously jeopardize this Court's appellate jurisdiction.

A comparison of the foregoing cases *inter se* indicates that a forum that is not fully competent by reason of statutory restrictions to adjudicate substantial Constitutional or substantive claims is constitutionally the same as no tribunal at all. Also *cf. Bell v. Burson;* ____U.S.____, 39 U.S.L.W. 4607 (1971); *Sniadach v. Family Finance Co., supra; Southern Ry Co. v. Virginia,* 290 U.S. 190 (1933); *Londoner v. Denver,* 210 U.S. 373 (1910). Indispensible to such a meaningful forum are the principles of due process of law. Therefore, appellants contend that the statutory language that denies them the opportunity to raise any substantive or constitutional defenses to an action for eviction is violative of the principles of due process of law. Such a denial also operates to fragmentize the state court action further encumbering the state's orderly administration of justice.

3. *Oregon's F.E.D. Procedure May Stigmatize Appellants in the Community*

State proceedings operating to place a stigma or badge of infamy upon its citizens require the observance of procedural due process of law prior to the time the person is labled as such. *Wisconsin v. Constantineau, supra* (public drunk); *Weiman v. Updegraff,* 344 U.S. 183 (1952) (loyalty oath regarding subversive organizations); *Joint Anti-Facist Committee v. McGrath,* 341 U.S. 123 (1951) (review of list communist organizations). An eviction in Oregon places a stigma on the tenant in the community. The Oregon Statute requires that the jury, if the cause is tried by a jury, find the defendant "guilty" or "not guilty." Oregon Rev. Stat. § 105.150. It furthermore describes the conduct as if equating it with the crime of trespass. *Compare* Oregon

Rev. Stat. § 105.105, *and* 164.460, *and* 164.462. If a person is to be stigmatized as having committed a crime, due process must be observed. *See Jenkins v. McKeithen,* 395 U.S. 411, 424-430 (1969). Mrs. Josephine Brown, the appellants' expert witness on low income housing, testified in her deposition concerning the matter as follows:

> Q. (By Mr. Clough): Have you talked to any families who have been or were about to be evicted from the dwellings in the low-income housing group?
> A. I have been—talked to people who have been evicted.
> Q. What is the fact [effect] of an eviction in general among low-income people?
> A. Well, there's many different facets to it. There is financial harm because they are living on—on the edge of nothing, anyway. They have to skimp to be able to pay their extra costs of moving and the item that they can skimp on the easiest is food. Then their health suffers. It's an emotional trauma.
>
> Parents are feeling less and less able to cope. *They lose standing in the community. They lose standing in their children's eyes. The children suffer the stigma from the children in the neighborhood* knowing that they are having to move out because they can't pay their bills, or something like this.
>
> Many times families can't find anything adequate, so they put up with something less adequate than they need. I know of one family that was evicted, a family of ten who was as late as last fall—still had not found housing that could keep them all under one roof. The children were split. [Emphasis supplied]

Surely the substantive effect of stigma in the community placed upon evicted tenants can require no less than the ability to assert all defenses possible to an action for eviction.

C. The Oregon Statutory Provision Found in Oregon Revised Statute § 105.125 (3) That Enables a Plaintiff in an Action for Eviction to Merely Allege That the Defendant is "Holding the Premises by Force" Without any Definition Thereof in the Complaint Violates the Due Process Clause of the Fourteenth Amendments to the United States Constitution.

Due process requires that adequate notice must be given of the grounds relied upon in the complaint so that the defendant may knowledgeably prepare his defense. Appellants contend that the permissible allegation of the complaint in an eviction action that the tenant is holding by "force" does not provide adequate notice of the grounds upon which the plaintiff is proceeding, thereby, not providing the tenant sufficient information to prepare a meaningful defense.

The landlord merely alleges that the tenant has "entered upon the premises with force or unlawfully holds the premises with force." Oregon Rev. Stat. § 105.125(3). The typical eviction action, whether based upon nonpayment of rent or holding after 30-day notice is given, involves the unlawful holding by force. The permissibly bald allegation that a tenant is holding by force leads to a misunderstanding of the nature of the action, since, for clarification of the terms, recourse must be made to Oregon Rev. Stat. § 105.115, to which no reference is made in the complaint. The tenant may, for example, understand that he faces a proceeding to evict him from his home, but he may not understand the ramifications of the terms used thinking he can easily defend the action himself since he is not holding the property by "force" in the everyday meaning of the word. This is important, because it may affect his judgment as to whether or not he should seek legal advice. Also, he has no notice of whether the basis of the landlord's claim is alleged nonpayment of rent, termination pursuant to an alleged 30 day notice, etc.

Therefore, Oregon Rev. Stat. § 105.125(3) is unconstitutional and void as violative of the principles of due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution. See *Kelley v. Wyman, supra; Goldberg v. Kelley, supra; Sniadach v. Family Finance Co., supra; Willner v. Committee on Character and Fitness, supra; Greene v. McElroy,* 360 U.S. 474 (1959); *Armstrong v. Manzo, supra; Ohio Bell v. P.U.C., supra; State v. Jamison,* 251 Or. 114, 444 P.2d 15 (1968); *Board of Medical Examiners v. Buck,* 192 Or. 66, 232 P.2d 791 (1951) *Cf. Gonzales v. United States, supra; Morgan v. United States, supra.*

D. The Oregon Statutory Provisions Found in Oregon Revised Stat. § 105.135 That Provides a Mandatory Requirement That a Trial be Held Within Two to Four Days From the Date of Service of the Complaint Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Due process also requires that the defendant must have sufficient time between service of notice and trial so that he may meaningfully prepare his defense. Appellants contend that the requirement that a hearing be held within two to four days as provided by Oregon Revised Stat. § 105.135 and the two day limitation on continuance without a bond as provided by Oregon Revised Stat. § 105.140 operate to deprive the tenant of sufficient time within which he may prepare a meaningful defense.

Once served with the summons, the tenant faces a "trial" within two to four days. Oregon Rev. Stat. § 105.135. Usually the landlord opts for the trial within two days and most hearings are so designated. If, as is frequently the case, the complaint is served late Friday afternoon, the hearing is scheduled for Monday afternoon. The end result is, of course, that the tenant is unable to seek the advice of counsel over the week-end, and in view of the difficulty of obtaining a lawyer in the morning to represent him in the

afternoon, he may attempt to defend the action himself or merely default. The majority of residential evictions are instituted in the District Court of the State of Oregon (Oregon Rev. Stat. § 46.060(e)) and the great majority of these are heard without counsel. The defendant is unable to get a continuance as a matter of right for greater than two days since he is limited by the provisions of Oregon Rev. Stat. § 105.140. The range of time that a defendant may get to prepare for trial is, therefore, four to six days, assuming, of course, that he is advised to request the continuance. Furthermore, the ability to prepare for trial is seriously encumbered since although discovery might be permitted as usually done in Oregon court action, the time constraints in an F.E.D. action render discovery a practical impossibility.

Therefore, Oregon Rev. Stat. §§ 105.135 and .105.140 are unconstitutional and void as violative of due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution. See *Mullane v. Central Hanover Bank and Trust Co., supra; Armstrong v. Manzo, supra; Kelley v. Wyman, supra; Goldberg v. Kelley, supra; Milliken v. Meyer, supra; Ohio Bell v. P.U.C., supra; Hurwitz v. North,* 271 U.S. 40 (1926); *Roller v. Holly,* 176 U.S. 398 (1900); *Podolsky v. Devinney,* 281 F.Supp. 488 (S.D.N.Y., 1968); *Holland Furnace Co. v. Willis,* 149 S.E.2d 93 (Ga., 1966); *Bd. of Med. Exam. v. Buck, supra; Frederick v. Douglas Co.,* 176 Or. 54, 155 P.2d 925 (1945). *Cf. In re Gault, supra.*

E. The Oregon Statutory Provision Found in Oregon Revised Statute § 105.160 That Mandatorily Requires the Defendant to Post a Double Rent Bond on Appeal Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The mandatory and arbitrary nature of the double rent bond on appeal as required by Oregon Rev. Stat. § 105.160 is attacked herein as violative of principles of due process of law. This provision was held to be constitutional by the Oregon Supreme Court. *Scales v. Spencer,* 246 Or. 111, 424

P.2d 242 (1967). If Oregon Rev. Stat. § 105.160 is declared unconstitutional, Oregon Rev. Stat. § 105.130 will still cause Oregon Rev. Stat. § 19.040 (1)(b) to be in effect which requires every appellant to furnish an undertaking adequately protecting the respondent during the pendency of the appeal. Furthermore, the trial judge will have opportunity to exercise his inherent discretion in a meaningful manner to preserve the interests of the parties pending appeal. Such discretion could include requiring payment of the rent into a court escrow account or some other variation thereof. *Generally, C.f.* Clough, "Pennsylvania's Rent Withholding Law", 73 Dick. L. Rev. 583 (1968-69); *National Council of the Junior Order of United American Mechanics v. Roberson,* 214 Pa. Super. 9, 248 A.2d 861 (1969); *Klein v. Allegheny County Health Dept.,* 441 Pa. 1, 269 A.2d 647 (1970); *DePaul v. Kauffman,* 441 Pa. 386, 272 A.2d 500 (1971). Also *C.f. Tate v. Short,* ____U.S.____, 39 U.S.L.W. 4301 (1971); *Williams v. Illinois,* 399 U.S. 235, 244-245 (1970). Therefore, appellants contend that no harm or disruption of litigation will result from declaring Oregon Rev. Stat. § 105.160 unconstitutional.

Due process requires that no impediments to access to the courts be imposed to prevent litigants from vindicating their rights. Appellants emphasize that they clearly recognize that bonds *per se* are constitutionally permissable to preserve the *status quo. Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). Appellants do contend, however, that they must be reasonable to be consonant with due process principles.

If the tenant loses his trial (which he invariably does under the present statutory proceeding) his recourse is an appeal for a trial *de novo* before the Circuit Court of the State of Oregon. Oregon Rev. Stat. §§ 46.250 and 53.090. It should be emphasized here that the fact that the tenant is accorded a trial *de novo* on appeal to the Circuit Court does not avoid the other constitutional infirmaties raised in this appeal. On authority of Oregon Rev. Stat. §§ 105.105, *et seg.*, the Circuit Court refuses to hear affirmative defenses

and pursuant to Oregon Rev. Stat. § 105.135 sets the case for trial within the week. Immediately upon transfer of the papers to the Circuit Court clerk's desk the case is set for trial at the earliest time. The tenant in his trial *de novo* remains in the same posture as he was at the District Court level with the exception that he is in a court of record. In the ordinary course of events such a trial would be held within a week of the entry of judgment in the District Court. Therefore, the double rent bond on appeal is less an appellate bond than a precondition to a plenary trial. In order to obtain his trial *de novo* he is required to post a double rent bond on appeal as provided for by Oregon Rev. Stat. § 105.160. He is also required to pay the costs of the District Court or give security to them, however, as a practical matter these costs have been waived upon a showing of indigency in appropriate cases. However, the judges of the District Court and of the Circuit Court of the State of Oregon have consistently refused to alter the mandatory requirements of a double rent bond on appeal. Under present Oregon practice, there is no stay of execution unless the double rent bond is posted. The only way in which a tenant may pursue his appeal without fulfilling the requirement of a double rent bond on appeal is by vacating the premises pending the appeal. As a practical matter judgment rendered in the District Court is final in all residential eviction actions in Oregon.

As a general rule, there is no fundamental right to an appeal guaranteed by the Constitution. See *Griffin v. Illinois, supra.* However, the intent of the Framers indicate there is an exception to this general rule where the assertion of a denial of Constitutional rights is at issue. *See generally* brief Appendix "A", Section V. The investing of a concurrent ability to adjudicate Constitutional claims in the state courts would strongly suggest that there be a right of appeal or meaningful forum in those cases so that the jurisdiction of the Supreme Court may be preserved. By analogy, *see* and *compare* the cases providing Federal Habeas Corpus relief in a *post* trial situation where consti-

tutional grounds for relief are asserted: *E.g. Ex parte Hull*, 312 U.S. 546 (1941); *White v. Ragen, Warden*, 324 U.S. 869 (1945); *DeWitt v. Pail*, 366 F.2d 682 (9th Cir., 1966); *Stiltner v. Rhay*, 322 F.2d 314 (9th Cir., 1963); *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir., 1961); [also *DeCicco v. Reed*, 222 N.E.2d 346 (Ill., 1966)] *with* the cases cited for comparison in the discussion under the section on state provision of meaningful forum, *supra*. See also *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

The issue of raising Constitutional defenses and the subsequent ability to appeal them aside, the double rent bond on appeal under attack herein is an unreasonable impediment denying access to the court structure to vindicate substantial substantive rights. The operation of the appeal bond deprives the tenant from making a record from which he may appeal. When the action is brought in the State District Court he must appeal for a trial *de novo* in the State Circuit Court before he is in a position to have appellate review on a record and the law. *Compare* Oregon Rev. Stat. §§ 46.250 and 53.090. This *de facto* deprivation of ability to obtain a trial *de novo* is a denial of due process. *Cf. Hulett v. Julien*, 250 F. Supp. 208 (D. Ala., 1966). *Callan v. Wilson, Marshal*, 127 U.S. 540 (1888). *Hulett, supra*, held that a person did not have to submit to an unconstitutional trial to obtain a trial *de novo* on appeal and enjoined a magistrate who received his fees from costs assessed from so conducting the trial. *Callan, supra*, held that an individual charged with a crime had a right to a jury trial notwithstanding the fact that he would obtain a jury trial on appeal for a trial *de novo*. Appellants do not contend that the District Court trial is unconstitutional or that a record must be provided at that level. Appellants do contend that, in the spirit of *Hulett* and *Callan*, they have a due process right to appeal for their trial *de novo* and appeal to the Oregon Supreme Court, if necessary, without unreasonable impediments such as the arbitrary double rent bond on appeal under attack herein.

Appellants also contend that the arbitrary, mandatory requirement of a double rent bond on appeal invades the province of the judiciary in a manner similar to the deprivation of the ability to raise defenses. A trial judge who has heard the testimony in a case is in the best position to ascertain what type of bond will be sufficient to preserve the *status quo* and protect the parties while the case is pending appeal. *See* Oregon Rev. Stat. § 19.040(1)(b).

Since the operation of Oregon Rev. Stat. § 105.160 renders a *de facto* finish to litigation for an indigent, it is also violative of due process in that it deprives the defendant of his property without affording his due process of law. A tenant has a valuable property interest in his leasehold which is lost when he is evicted. See discussion in Section I A (1) Due Process, therefore, requires that he be permitted to appeal an adverse ruling without an unreasonable or arbitrary impediment such as a double rent bond.

F. The Oregon Statutory Scheme for Eviction Procedure as Found in Oregon Revised Statute §105.105, *Et Seq.* When Considered *In Toto*, Presents a Weighted and Unbalanced Procedure in Favor of the Landlord Thereby Violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Although the preceding discussion has dealt with the constitutional imfirmities of specific sections of Oregon's eviction law, Appellants emphasize here that the statute read as an integrated whole reveals a totally unbalanced procedure weighted in favor of the landlord. Once the landlord resorts to the State judicial machinery, assuming his technicalities are correct, he is virtually insured against loss of his judgment for restitution of the premises. Such a grossly unbalanced procedure cannot be permitted in our society, since it undermines respect for the Judicial system.

See Report of the National Advisory Commission on Civil Disorders, U.S. Gov't Printing Office 0-291-729 at 147 (1968). See also *Shelley v. Kraemer, supra.*

In his dissenting opinion in *Penn. R.R. Co. v. Day*, 360 U.S. 548, 554 (1959) Mr. Justice Black articulated the objections very well to the one-sided procedure under consideration therein. "Such an unequal procedure cannot be a fair trial since it gives one side a far better chance to win than the other. Analogous practices in both criminal and civil cases have been constantly struck down by this and many other courts." *Id.* at 562. Note particularly the examples given. *Id.* at 562, n. 14.[18] *See also Union Pacific R.R. Co. v. Price*, 360 U.S. 601, 621 (1959) (Justice Douglas' dissent). See also *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). In *Penn R.R. Co. v. Day, supra*, Justice Black referred to the equal protection clause of the Fifth Amendment as support for his position that lopsided procedures should be stricken down. In arriving at this conclusion an analogy was drawn to *Bolling v. Sharpe, supra*, which handled a *Brown v. Board of Ed.*, 347 U.S. 483 (1954), situation in the federal context. The clear inference drawn from the

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[18]Note 14 in 360 U.S. *supra* at 562: "e.g., *Burns v. Ohio*, 360 U.S. 252, 3 L ed 2d 1209, 79 S. Ct. 1164 (state required to allow indigent defendant to appeal in forma pauperis from criminal conviction where appeal as of right allowed other defendants); *Griffin v. Illinois*, 351 U.S. 12, 100 L ed 891, 76 S. Ct. 585, 55 ALR2d 1055 (same); Spartanburg v. Cudd, 132 S.C. 264, 128 SE 360 (right to jury redetermination of administrative award in condemnation suit must be allowed municipality if permitted to property owner); Georgia Power Co. v. Brooks, 207 Ga 406, 62 SE2d 183 (statute allowing one party to a condemnation valuation suit to introduce evidence of "similar sales" while other party is not, held invalid); People v Sholem, 238 Ill 203, 87 NE 390 (appeal from administrative determination of valuation of an estate for tax purposes must be allowed State if allowed other party); Hecker v Illinois Cent. R. Co. 231 Ill 574, 83 NE 456 (statute providing for state supreme court review of facts after trial court's findings reversed without grant of new trial by intermediate appellate court, but denying such review if trial court's findings upheld, found invalid)."

foregoing is that there is an equal protection clause incorporated by inference in the Fifth Amendment requiring some procedural balance in treatment accorded classes of litigants as antagonists in the litigation context. This is presented as an alternative approach to handling the arbitrariness of the within statute.

It should be well noted that the courts are the sole arbiters to which recourse may be had for the resolution of disputes. It is the ability of resort to the courts that makes any bargaining process workable. Remove the possibility of meaningful recourse to the courts and a party in a bargaining situation is rendered helpless at the total mercy of the person with whom he is negotiating.

> We must recognize the fact that . . . critical changes have taken place economically and socially. Aware of such changes, we must realize further that most frequently today the average prospective tenant vis-a-vis the prospective landlord occupies a disadvantageous position. Stark necessity very often forces a tenant into occupancy of premises far from desirable and in a defective state of repair. The acute housing shortage mandates that the average prospective tenant accede to the demands of the prospective landlord as to conditions of rental, which, under ordinary conditions with housing available, the average tenant would not and should not accept.
>
> No longer does the average prospective tenant occupy a free bargaining status and no longer do the average landlord-to-be and tenant-to-be negotiate a lease on an 'arm's length' basis. Premises which, under normal circumstances, would be completely unattractive for rental are now, by necessity, at a premium. If our law is to keep in tune with our times we must recognize the present day inferior position of the average tenant vis-a-vis the landlord when it comes to negotiating a lease.
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> *Reitmeyer v. Sprecher*, 431 Pa. 284, 289, 243 A. 2d 395, 398 (1968).

To the same effect see *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1079, review denied 400 U.S. 925 (1970); *Edwards v. Habib, supra* at 701.

If the tenant were not already at enough of a disadvantage under present economic and social conditions, the State of Oregon would have them bound and gagged before the courts as well. When this situation is exacerbated by poverty, the statutory scheme becomes a monstrosity.

The statute abridges and chills the appellants' First Amendment right to petition for redress of grievances. *United Mineworkers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). *C.f., e.g., Ex Parte Young*, 209 U.S. 123, 145-148 (1908).

Where procedural due process is concerned outmoded statutes such as Oregon's F.E.D. law under attack herein cannot withstand the scruting of judicial fairness. *See Jones v. United States*, 362 U.S. 257, 266 (1960); *Funk v. United States*, 290 U.S. 371, 381-383 (1933). The irreparable harm caused by evictions of low income individuals such as appellants herein has been totally unrebutted by appellees. See Deposition of Mrs. Josephine Brown R. Plaintiff's Exhibit No. 24. "To sanction such a ruthless consequence, inevitably resulting from a" statute such as Oregon's eviction law "would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' (John Cournos, A Modern Plutarch, p. 27)" *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Justice Frankfurter's concurring opinion).

Appellants herein seek only to be given a fair chance to assert their case before the State courts. The only way in which this may be accomplished is through the relief requested in this appeal.

CONCLUSION

The decision of the District Court upholding the constitutionality of Oregon's eviction statutes was erroneous, and its judgment in favor of Appellees should be reversed. The District Court should be instructed to:

1. Declare ORS § 105.115 - 105.150 unconstitutional insofar as they deny defendants in F.E.D. actions the right to raise affirmative defenses, and order Defendants Judges to hear and decide proposed affirmative defenses on their merits, issuing such reasonable protective orders as may be necessary to protect landlords from loss during litigation against insolvent tenants;

2. Declare ORS § 105.125 unconstitutional insofar as it fails to require plaintiffs in F.E.D. actions to allege with specificity the basis for the action, and order Defendants Judges to strike complaints not containing such specific allegations;

3. Declare ORS §§ 105.135 and 105.140 unconstitutional, and order Defendants Judges to apply to F.E.D. defendants only those statutes regarding trial settings and continuances which are applicable to defendants generally, and, where discretion is permitted by such statutes, to set trials as soon as necessary to protect landlords from loss during litigation with insolvent tenants, so long as no tenant is denied a reasonable time to prepare for trial;

4. Declare ORS § 105.160 unconstitutional, and order Defendant Judges to apply to tenants wishing to appeal

F.E.D. actions only those statutes applicable to civil appellants generally.

Respectfully submitted,

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APPENDIX "A"

This appendix is intended to be a supplement to the materials developed in the Argument concerning Procedural Due Process.

HISTORICAL BACKGROUND

I. INTRODUCTION

There are many threads of thought and manifestations thereof within American constitutional development which, when considered as an integrated whole, indicate conclusively that the people have a fundamental right of access to the courts protected by procedural due process safeguards.

Appellants contend that foundation for the right of meaningful access is found by necessary implication in the United States Constitution. The implementation of the court structure and the procedural safeguards of the Bill of Rights were memorialized in constitutional dogma whereas the fundamental right to have access to the courts was either assumed to be encompassed in the First Amendment or overlooked and left unmentioned. The conclusion, therefore, is that it was merely an oversight as being one of those principles that was so fundamental that the Framers of our Constitution did not think it necessary to include as a specific enumerated right. It is drawn from Alexander Hamilton's discussion in support of the omission of a Bill of Rights from the Constitution where he stated that:

> Here in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. 'We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our States bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

The Federalist, No. 84, Mentor ed. (1961) at 513.

As reflected by the foregoing, there was considerable support for the proposition that a Bill of Rights was unnecessary in our Constitution because of its nature as a social compact of the people. It is clear, therefore, that the express declaration of the fundamental right of access was held to be unnecessary. And, it may have been further thought that the language of the First Amendment was intended to complete the logic. A similar anomaly can be found in the absence of a declaration of a fundamental right to bail in the Constitution. See Caleb Foote, "The Coming Constitutional Crisis on Bail," 113 U. of Pa. L.R. 959, 968, 984-989 (1965).

II. THE SOCIAL COMPACT

The expression of political thought in the Declaration of Independence, seasoned by the hard experience of the Confederation set the stage for the adoption of our constitution. The Framers were steeped in the teachings of the schools of natural law and natural rights.[1] These ideas were then embodied in our Constitution as a social compact of the people. Concisely stated "(t)he origin of government—that is to say, legitimate government—is a compact or contract among equal men, who pledge allegiance and obedience in return for protection of their natural rights and peace in harvesting the fruits of their labors. Sovereignty rests, if it rests anywhere at all, in the body of the whole people. The

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[1] At the time of the Federal Convention in 1787 "(t)he largest part of the intellectual baggage of the framers, whether of stars like Madison, Mason, and Wilson or of bitplayers like Richard Dobbs Spaight, Jared Ingersoll, and William Pierce, was a tempered version of the oldest and most famous of liberty-oriented political philosophers: the school of natural law and natural rights . . . finding its most persuasive exposition in the English language in John Locke's second treatise *Of Civil Government* (1690). . . ." Clinton Rossiter, "1787 The Grand Convention," Mentor ed. p. 51 (1966).

basis of government is therefore the consent of the governed. The most valid obligation to obey the law is self-obligation." Clinton Rossiter, "1787 The Grand Convention," Mentor ed. p. 53 (1966). See generally *Id.* at 52-55; Rossiter, "Seedtime of the Republic" (New York, 1953) particularly pp. 139-146, 326-499.

Concerning the type of issues joined in the instant appeal, the writings of John Locke are surprisingly relevant. John Locke described as a natural right that of a wronged individual to have reparation from the wrongdoer. John Locke, *Of Civil Government*, Chapter III, section 11 ["The English Philosophers," Modern Library Ed. (1939) at p. 407.] Such an individual in the state of nature "has a liberty to judge of or defend his right." Locke, *supra*, Chapter VII, Section 91 at 439. In our ordered society he surrenders this right to the Judiciary. *See also* Thomas Hobbes, "Leviathan" (1651), Ch. XVIII, Eighth point, "The English Philosophers," *supra* at 181. Meaningful access to the Judiciary is mandatory since even "(i)n absolute monarchies, indeed as well as other governments of the world, the subjects have an appeal to the law, and judges to decide any controversies and restrain any violence that may happen betwixt the subjects themselves, one amongst another. *See also* Hobbes "Leviathan," Chapter XV, *supra* at 171. This everyone thinks necessary, and believes he deserves to be thought a declared enemy to society and mankind who should go about to take it away." *Id.* (Section 93)

Locke postulates that the impetus for the preservation of this right or liberty is the desire on the part of the ruler or government to maintain an ordered productive society upon which he may draw as a recourse. However, the considerations of whether this is a right or a privilege in the American experiment are settled by a circular logic. Our government's power is found in the people. Since that is the case, their natural rights would be considered fundamental. There is no necessity to question whether this be a right or a privilege as may be done in other forms

of government, since it is already a right by the nature of our Constitution form of government. Here, Locke's basic premises are particularly expressed through the concept of due process of law.

The broad philosophical basis for our Constitution was reflected clearly in its Preamble.

> "We the People of the United States, in order to form a more perfect Union, establish Justice, . . . do ordain and establish this Constitution for the United States of America."

Not too surprisingly, the phrase "We the People" was specifically debated and discussed in at least three of the ratifying conventions.[2] Mr. Spencer of North Carolina concisely summarized this philosophical basis of the Constitution.

> "But in this case, in regard to the government which it is proposed we should adopt, there are no governors or rulers, we being the people who possess all power." 4 Elliot's Debates (2nd ed., 1863) at 12.

It is clear that the various officers and agents of the government exist for the promotion and protection of the welfare of the people. In Yates' Minutes of the Secret Debates

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[2] It was raised in Virginia by the rhetoric of Patrick Henry, 3 Elliot's Debates, (2nd ed., 1863) 22 as he advanced his "states' rights" theories of government. He was answered that the government belonged to the people by Governor Randolph, a member of the Federal Convention, *Id.* at 28, and Mr. Pendleton, *Id.* at 37. See also the statements of Mr. Lee, *Id.* at 42; and Mr. Corbin, *Id.* at 104.

In North Carolina, Mr. Iredell stated that "our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents; . . . . ," 4 Elliot's Debates, *supra* at 9. See also the statements of Mr. Goudy, *Id.* at 10; Mr. Caldwell, *Id.* at 15; Mr. Maclaine, *Id.* at 16, 24, 25; Mr. Iredell, *Id.* at 23; and Mr. Taylor, *Id.* at 23, 24.

In Pennsylvania, similar statements were made by Mr. Wilson, a member of the Federal Convention, 2 Elliot's Debates, supra at 434-435.

of the Federal Convention itself, Alexander Hamilton made it clear that,

> (t)here can be no truer principle than this—that every individual of the community at large has an equal right to the protection of the government. 1 Elliot's Debates, *supra* at 463.

The principles of natural law and the social compact theories were well recognized and supplied the basis for many legal theories subsequently determined by this Court. See *e.g. Calder v. Bull*, 3 Dall. 386, 388 (1798).[3]

III. THE NINTH AMENDMENT

Further reflection of this philosophical basis is found in the Ninth Amendment to the United States Constitution which provides that "(t)he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[4] Although it has been advanced that the Ninth Amendment is merely language to prevent the Bill of Rights from being interpreted as an exclusive list of rights,[5] it is, in reality, a reflection of the

[3] *See also e.g. Martin v. Hunter's Lessee*, 1 Wheat. 304, 324-325 (1816); *M'Culloch v. Maryland*, 4 Wheat. 316, 403-405 (1819); *United States v. Cruikshank*, 2 Otto 542, 549-550 (1875). See also *Marbury v. Madison*, 1 Cranch 137 (1803); *Luther v. Borden*, 7 How. 1 (1849).

[4] This Amendment and its corrolary, the Tenth are not excess verbiage and must be afforded meaning since "(i)t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison, supra* at 174. See also *Myers v. United States*, 272 U.S. 52, 151 (1926). See generally, N. Redlich, "Are there Certain Rights *** Retained by the People?" 37 N.Y.U.L. Rev. 787 (1962); K.H. Kelsey, "The Ninth Amendment of the Federal Constitution," 11 Indiana L. J. 309 (1936).

[5] Justice Goldberg indicated in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 481, 490 (1965), that "(t)he(se) statement of Madison and Story (concerning the Ninth Amendment) make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."

far broader philosophical basis for the very adoption of the Constitution, clearly stated in the Preamble.

Utilization of the Ninth Amendment to include rights reserved to the people by necessary implication is not a novel approach.[6] In the context of access to the courts, such a conclusion was approached by Justice Black in *Meltzer v. LeCraw*, ___ U.S. ___, 39 U.S.L.W. 3483 (1971).

> The decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that *the civil courts of the United States and each of the States belong to the people* of this country and that no person can be denied access to those courts, either for a trial or an appeal . . . . (emphasis supplied)

IV. THE JUDICIARY AND ACCESS THERETO

The records of the Federal Convention and the subsequent ratifying conventions of the states, display a clear intent to preserve inviolate the peoples' access to the judiciary. Considerable debate was held over the propriety of establishing a federal judiciary as opposed to vesting the power in the existing state court structures.

The discussion concerning the establishment of the Supreme Court and its inferior tribunals reflected the consideration of the Framers concerning the judiciary in general. Mr. Spaight of North Carolina, a member of the Federal Convention, stated that the Framers wished that the Judiciary be established "to consult the ease and convenience of the people" and "to accommodate every citizen." 4 Elliot's Debates, *supra* at 139. In Virginia, similar intent was expressed by Mr. Madison, 3 Elliot's Debates, *supra* at 535, and Mr. Pendleton, *Id.* at 547. Mr. Maclaine of North

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[6] For example, it has been recognized that the right of a citizen to act as a party official or worker to further his own political views is of the nature of political rights reserved to the people by the Ninth and Tenth Amendments. *United Public Workers v. Mitchell*, 330 U.S. 75, 94-96 (1947).

Carolina supposed "that whatever courts there may be, they will be established according to the convenience of the people." 4 Elliot's Debates *supra* 139. So too with Governor Johnston of North Carolina, *Id.* at 141. It is clear from the tenor of the foregoing statements, albeit made in a context alluding to geographical access, that the utilization of the Judicial structure, state or federal was regarded as being open to the people for convenient access.

V. STRUCTURE OF THE JUDICIARY AND APPELLATE JURISDICTION

Great pains were taken to secure competence and impartiality in the Courts through appointment of the judiciary by the President with the advice and consent of the Congress, Article II, Section 2 of the United States Constitution; and by granting life terms and a non-diminishing compensation, Article III, Section 1, of the United States Constitution. See generally "The Federalist" Nos. 78-82 (Mentor ed., 1961) pp. 464-495. It should be noted, however, that Article III, Section 1 of the Constitution provides only that there shall be a Supreme Court with the provision of inferior tribunals left to the determination of Congress.

One of the constitutionally clearest of the Supreme Court's jurisdictional grants is its appellate jurisdiction found in Article III, Section 2 of the United States Constitution. Although an argument can be made that the inferior tribunals had original jurisdiction similarly granted to them on a general basis by the Constitution, their ability to entertain actions in the first instance is largely a creature of statute expanded by Congress in the 1870's. See *e.g.* Historical origins of 28 U.S.C. § 1342 (1875) and 42 U.S.C. § 1981, *et seq.* (1871). It should, therefore, be remembered that the Framers had appellate jurisdiction as one of the major considerations when they discussed the Federal Judiciary. *See e.g. United States v. Yale Todd,* 14 L.Ed. 47, 48 (1794) (Not officially reported).

Considerable discussion centered about the identity of the "inferior tribunals" and the propiety of appellate jurisdiction. The concern revolved about the utilization of existing state courts as the "inferior tribunals." The Framers opted for an independent federal judiciary to provide the bastion for the protection of Constitutional rights; however, they considered ". . . the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State Courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited." Hamilton, "The Federalist" No. 82, *supra* at 493. "The Courts of the latter (the States) will of course be natural auxiliaries to the execution of the laws of the Union. . . ." *Id.* at 494. See generally *Id.* at 491-495. The foregoing would certainly suggest that the States have a concurrent duty to provide meaningful access no less than that of the Federal government. *See Claflin v. Houseman*, 93 U.S. 130, 136-143 (1876); *Robb v. Connelly*, 111 U.S. 624, 636-639 (1884).

Alexander Hamilton further recognized that if the State tribunal were invested with the power of being the inferior tribunals to the Supreme Court "there would be a corresponding necessity for leaving the door of appeal as wide as possible." The Federalist No. 81, *supra* at 486. In the course of the debates in Virginia, the question was raised and discussed concerning the propriety of the appellate jurisdiction of the courts alluding to the potential prosecution of false appeals. James Madison's answer to that argument was simply and directly that "(t)he circulation of confidence (in the Courts) is better than the circulation of money." 3 Elliot's Debates, *supra* at 538. Since the issue of false or frivolous lawsuits and appeals is the most frequent argument against uninhibited access, it would seem that the absolute requirement of maintaining confidence in the courts far counterbalances the possibility of frivolous lawsuits and appeals in protecting open access to the judicial process.

In context, the foregoing suggests that there may be exceptions to the general rule that there is no right of appeal within state court judicial structures.

VI. DUTIES AND FUNCTIONS OF THE JUDICIARY

The duties and functions of the Courts include keeping the legislature within its limitations and interpreting the laws as individual disputes arise. See Alexander Hamilton's discussion in "The Federalist" No. 78, *supra* at 464. The duty however, does not stop there since,

> The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of *all subjects of litigation* between parties within its jurisdiction, though their causes of dispute are relative to the laws of the most distant part of the globe. (Emphasis supplied)
>
> Hamilton, "The Federalist," No. 82 *supra* at 493.

VII. FLEXIBILITY OF THE CONSTITUTION

Our Constitution should be placed in the additional context that it was written to last for "ages." For this to continue to be the case, the Constitution must maintain the flexibility for which it was designed. See discussion of Madison and Hamilton concerning tenure of office in Yate's Minutes of the Secret Debates of the Convention. 1 Elliot's Debates, *supra* at 449-451. Madison's comments concerning preservation of the power of the landed interests are particularly appropriate here, and we would do well to remember Hamilton's answer thereto: "The only distinction which remained at Rome was, at last, between the rich and poor." *Id.* at 450-451.

VIII. THE FIRST AMENDMENT

In connection with answering the right to access question the First Amendment is more than atmospherically relevant. The First Amendment, of course, provides a right of the people to "petition the Government for a redress of grievances." It is well settled that this provision of the First Amendment, is interpreted to include use of the Courts and that this provision is extended to the states through the Fourteenth Amendment. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); and *NAACP v. Button*, 371 U.S. 415 (1963). These cases conclude that the right to petition the courts includes the right to do so through counsel of their choice and this right may not be abridged by the states. If the people have the right to petition the courts through use of their chosen counsel, it seems illogical that the fundamental right to petition the courts for redress could be deprived by the denial of meaningful access. If the people are to have realistic fulfillment of this First Amendment right, it is clear that they must have viable access to that branch of the government that is designed to be the final arbitrator in private disputes as well as those with the government.

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In the Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY et al,

Appellants,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah,

Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE NORMET

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Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE NORMET

STATEMENT OF THE CASE

Substantially all of the facts of the case are agreed and are set forth in the Pretrial Order (A. 42-50). Appellee deems it necessary to supplement appellants' statement of the case and clarify certain of the statements of fact made by the appellants.

At the time this case arose appellee was the owner of the seller's interest in a single family residence under a contract of sale thereof, and held the legal title only to secure the purchaser's performance of

the contract. An assignee of the purchaser's interest in the contract had rented the residence to appellants. Appellants are month to month tenants and their tenancy can be terminated by either party by 30 days' prior written notice ot the other party (A. 42-44); see Or. Rev. Stat. § 91.070. Appellants paid in advance $100 per month as rent for the residence (A. 42).

When appellee did not receive a number of the payments due under the contract of sale, appellee began collecting the rent from appellants and crediting the amounts received on the unpaid balance under the contract of sale. Even after crediting such amounts, the assignee of the purchaser was in default under the contract, and appellee filed a suit to foreclose all rights in the residence arising under the contract of sale. Appellants were named as defendants because they were in possession of the residence (A. 44).

Prior thereto a complaint was made to the Bureau of Buildings of the City of Portland, Oregon, in behalf of the appellants concerning the condition of the residence. The Bureau inspected the residence and found certain conditions that violated the Portland Housing Code. The Bureau ordered the appellants and appellee to vacate the residence within 30 days or show cause why the residence should not be vacated. Appellants requested appellee to make the required repairs, and appellee made certain repairs. However, appellee did not make any repairs requiring substantial expenditures due to the condition of the title to the residence. Appellants did not vacate the residence

as directed by the Bureau, and thereafter refused to pay the rent as it became due (A. 42-44). Appellants contended that they were threatened with eviction, and filed this case in the U. S. District Court for the District of Oregon seeking a declaration that Or. Rev. Stat. §§ 105.105-.160 are unconstitutional and an order enjoining appellee, the judges of the District Court of the State of Oregon for the County of Multnomah, the Director of the Bureau of Buildings, and others from evicting appellants from the residence.

Appellants' statement that appellee threatened to evict appellants in retaliation for reporting violations of the Housing Code of the City of Portland, Oregon, is mere speculation and is not supported by the agreed facts or any other evidence in the case. Appellee merely advised the appellants that they must vacate the residence in compliance with the order of the Bureau of Buildings of the City of Portland (Pl. Ex. 14; transcript of proceedings June 18, 1970, at p. 50). Appellee has not filed against appellants any eviction action under Or. Rev. Stat. §§ 105.105-.160.

One of the other initial plaintiffs, Evaret Snyder, did not report any housing code violations to the City of Portland, and none were found to exist. Snyder merely refused to pay rent unless his landlord made certain requested repairs. The Oregon Legislature has not enacted a statute granting a tenant the right to withhold payment of rent to compel a landlord to repair rented property. Snyder was threatened with eviction solely for not paying rent when it became

due and not in retaliation for his exercise of any legal right (A. 45).

Eviction actions were filed against three of the other plaintiffs, Bonnie L. Colton, Keith L. Oetting and Randall Lowe (Pl. Exs. 1, 2, 47; transcript of proceedings June 18, 1970, at page 50; A. 46-49). The tenants raised certain of the defenses discussed by appellants, but in none of the eviction actions did the tenants raise the defense that they were being evicted in retaliation for reporting housing code violations or exercising any other legal rights (Pl. Exs. 1, 2, 47). Bonnie L. Colton was permitted to raise all of the affirmative defenses which she desired to raise in the eviction action brought against her. The landlord did not object (A. 46). In the Oetting and Lowe eviction actions the defenses were stricken on the grounds that the defenses were not relevant to the question of who had the right to possession of the property (A. 47-49). None of the cases were appealed to the Oregon Supreme Court.

Prior to the entry of the judgment of the U. S. District Court in this case, the case was dismissed and rendered moot as to the issues between all of the plaintiffs and their respective defendants except the issues between Donald Lindsay and Edna Lindsay and Dorothea M. Normet and the judges of the District Court of the State of Oregon for the County of Multnomah (A. 4, 7, 9, 48).

The U. S. District Court issued its opinion and judgment declaring that Oregon's eviction statutes,

Or. Rev. Stat. §§ 105.105-.160 are constitutional, vacating the temporary restraining order issued during the pendency of the case, and dismissing the action (A. 72-79). The only plaintiffs appealing the judgment of the U. S. District Court are the Lindsays, the issues between all of the other parties having been dismissed and rendered moot.

The appellants contend here for the first time that the Oregon courts will not allow the defense of retaliatory eviction in an eviction action. There is no evidence in this case that the defense of retaliatory eviction has been presented to an Oregon trial or appellate court in an eviction action, nor was the contention that retaliatory eviction was not an available defense raised or argued to the U. S. District Court in the proceedings below either in written briefs or oral argument (R. 55-122, 148A-149; transcript of proceedings June 18, 1970).

ARGUMENT

1. Oregon's eviction law does not deny tenants the Equal Protection of the law guaranteed by the Fourteenth Amendment to the U. S. Constitution.

Oregon's eviction law protects one in possession of real property, such as a tenant, from forcible eviction by anyone claiming the right to possession of the property.[1] A person claiming the right to possession of real property in the possession of another is prohibited from taking possession of the property without first obtaining a court determination that he has the legal right to possession.[2] Also, he must allow the county sheriff to repossess the property for him.[3]

Oregon's eviction law does not establish a "suspect classification" as appellants contend. There are obvious factual and legal characteristics which are unique to the landlord-tenant relationship. The landlord owns the real property and is entitled to certain rights which are derived from such ownership. The tenant has possession of the landlord's property, and is in a position to deny the landlord these rights unless the landlord is entitled to remove the tenant from the property when his rights are denied. The state compels a landlord to obtain a court determination that he is legally entitled to possession of his property before he can remove the tenant from it. These unique characteristics are sufficient justification for the

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[1] Or. Rev. Stat. § 105.105.
[2] Or. Rev. Stat. § 105.110.
[3] Or. Rev. Stat. § 105.155.

state to provide a special procedure for determining the right to possession of real property in the possession of a tenant. The consideration of only the right to possession and relevant defenses, and the elimination of the extensive delays of the ordinary litigation process unless the landlord is provided adequate security are clearly relevant to the objective of the eviction law.

Since there is sufficient justification for providing a special procedure for determining the legal right to possession of real property between a tenant and a landlord claiming the legal right to possession, and the procedure established accomplishes the objective of the law in a reasonable manner, Oregon's eviction law does not violate the Equal Protection clause of the Fourteenth Amendment to the U. S. Constitution.[4] The mere fact that a more desirable procedure could have been established by the Oregon Legislature does not render the actual procedure established unconstitutional.[5]

Oregon's eviction law makes available to landlords and tenants an added procedure for obtaining a court determination of the right to possession of the rented property and relevant defenses. The procedure is an addition to the general court procedure. The eviction procedure does not deprive a tenant of the right to assert other claims he may have against his landlord under the general court procedure available to all. The

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[4] *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

[5] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

tenant need only pay the rent which he is otherwise obligated to pay during the pendency of the court action so as not to be subject to eviction for failing to pay rent. Oregon's eviction procedure equally prohibits the landlord from raising any issues other than the issue of the right to possession of the property. The landlord may not join claims for unpaid rent, for damage to the property, for damages for wrongfully withholding the property, or for breach of any other provision of the agreement between them and avail himself of the eviction procedure of Or. Rev. Stat. §§ 105.105-.160.[6] The limitation of the eviction procedure to consideration of the issue of the right to possession and relevant defenses is therefore not so unreasonable as to violate the Equal Protection clause of the Fourteenth Amendment to the U. S. Constitution.

Oregon's eviction law does not create a procedural distinction based on wealth as appellants contend. With the exception of the requirement of the appeal bond, a tenant is not required to pay or provide security for any amount in excess of the rent which he obligated himself to pay when he rented the porperty from his landlord. Oregon's eviction procedure does not infringe upon a tenant's right to the sanctity of his home or any other fundamental right. The guarantee of such rights is predicated on the assumption that the tenant has the legal right to possess the residence in which he has established his home. Oregon's eviction law merely establishes a procedure whereby

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[6] See Or. Rev. Stat. §§ 16.220(1)(i), 105.105-.160.

his landlord can obtain a court determination as to whether the tenant has the legal right to the possession of the residence. If the tenant has the right to possession of the residence he will not be disturbed as a result of Oregon's eviction procedure. Therefore, the procedure clearly does not invade the sanctity of the tenant's home. The concept expressed in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and the other cases cited by appellants are not applicable here.

2. Oregon's eviction law does not violate the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution by reason of the fact that a tenant cannot assert in an eviction action all of the claims he may have against his landlord.

Oregon's eviction law does not deny the tenant the opportunity to assert any defenses in an eviction action as appellants contend. The scope of the defenses which a tenant can assert are limited solely by the fact that the eviction action involves the consideration of only the issue of the right to possession of the property. The tenant can assert those defenses which are relevant to the issue of the right to possession of the property.

Generally in an eviction action, the landlord asserts the right to possession of the property by reason of a right granted by Or. Rev. Stat. §§ 91.070, 91.080, or 91.090.[7] The Oregon Supreme Court has held on a number of occasions that the tenant can assert defenses which are relevant to the questions raised by

[7] See Appendix "A."

the landlord's claim to the right of possession of the property under one of the above statutes.[8]

The appellants have set forth in their brief three defenses which they contend are relevant to the issue of the right to possession yet are not available defenses under Oregon's eviction proceedings. The first is that the lease is illegal and therefore unenforceable because conditions existing in the property violate the city housing codes. The second is that the landlord has breached his implied warranty that the property is habitable. The third is that the landlord is seeking to evict the tenant in retaliation for the tenant exercising his legal rights.

The agreement between a landlord and a tenant is not illegal because the residence rented contains conditions which violate the housing code of the City of Portland. The code makes it unlawful to use or occupy a residence only when the Bureau of Building Inspections has previously found conditions in the residence which violate the housing code, and has ordered the conditions repaired or the reisdence vacated.[9] The rule

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[8] See *Friedenthal* v. *Thompson*, 146 Or. 640, 31 P.2d 643 (1934) (reformation of written lease); *Share* v. *Williams*, 204 Or. 664, 277 P.2d 775, 285 P.2d 523 (1955) (defendants asserted rights under agreement cancelling contract of sale of property from plaintiff); *Leathers* v. *Peterson*, 195 Or. 62, 244 P.2d 619 (1952) (deed of property from defendant to plaintiff was intended as a mortgage and defendant was the owner of the property); *Priester* v. *Thrall*, 229 Or. 184, 349 P.2d 866, 365 P.2d 1050 (1961) (plaintiffs held legal title to real property as trustees for defendants who held an equitable interest in the property).

[9] See Appendix "B" to Motion of Appellee Normet to Dismiss or in the Alternative Affirm.

stated in *Uhlmann* v. *Kin Daw*[10] requires that the code either expressly state that agreements to rent residences containing code violations would violate the statute, or it must be clear that such was the legislative intent of the code. In none of the three eviction actions filed had the Bureau of Building Inspections found that the residence contained conditions which violated the housing codes and ordered the conditions repaired or the residence vacated.[11]

The City Council of the City of Portland on September 23, 1971, will consider a proposed ordinance prohibiting the renting of residences vacated by order of the Bureau of Building Inspections for failure to repair the code violations until the code violations have been repaired.

Even if the agreement between the landlord and the tenant were illegal and unenforceable, it is not relevant to the question of whether the landlord has the right to possession of his property. An action under Oregon's eviction law is not an action to enforce the agreement between the landlord and the tenant. It is an action brought to determine whether the landlord is entitled to possession of his property as granted under Or. Rev. Stat. §§ 91.070, 91.080, or 91.090. The fact that the agreement between the landlord and tenant may be illegal is not relevant to the question of whether the landlord is entitled to possession of the property under one of the above statutes. Generally, the judges of the District Court of the State of Ore-

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[10] 97 Or. 681, 193 Pac. 435 (1920).
[11] A. 45-49; Pl. Ex. 1, 2 and 47.

gon for the County of Multnomah, the trial court in the majority of the eviction actions, have held that the defense is not relevant, but the question has not been considered by the Oregon Supreme Court.

The fact that certain conditions on the rented property make the property uninhabitable is not relevant to the question of whether the landlord has the right to possession of his property. It is true that a few jurisdictions have imposed upon the landlord an implied warranty that rented property is habitable. The Oregon Supreme Court has not had the opportunity to consider this question, nor has the Oregon legislature imposed such a duty on the landlord in Oregon, or granted the tenant the right to withhold payment of rent to compel landlords to repair housing code violations existing in rented property. Clearly a state is not compelled by the Due Process clause of the Fourteenth Amendment to the U. S. Constitution to create such a warranty or such a right in the tenant either by legislative or judicial action. Since neither the warranty of habitability nor the right to withhold payment of rent to compel a landlord to repair housing code violations exists under Oregon law, the defense raised by the appellants in this case cannot be relevant to the issue presented in an eviction action.

The defense that the landlord seeks to evict the tenant in retaliation for the tenant asserting a legal right would appear to be a valid defense which a tenant could assert in an eviction action. There is no evidence in this case that a tenant has been deprived of

the opportunity to assert such defense in an eviction action or that the Oregon courts would refuse to allow such a defense had they the opportunity to consider it. The defense of retaliatory eviction was not raised before the trial courts in the eviction actions described in the statement of this case, nor has the Oregon Supreme Court considered the defense.[12] Nor does Or. Rev. Stat. §§ 105.105-.160 expressly prohibit this defense. Where possible it is this Court's duty to interpret Oregon's eviction law so as to render it constitutional if possible.[13]

In addition the question of the availability of the defense of retaliatory eviction was not presented to the U. S. District Court in the proceedings below in this case.[14] Appellants raise this question here for the first time. Added theories asserted for the first time on appeal to the United States Supreme Court are not regarded favorably, and are rejected except in cases of unusual importance, which is clearly not the case here.[15]

In no event would the defenses of illegality of the agreement between the landlord and the tenant and breach of the warranty of habitability be relevant where the eviction action is brought on the ground that the tenant's lease has expired, or the landlord has given the tenant notice to vacate the property as provided by statute. Appellants appear to concede this fact.[16]

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[12] See Pl. Exs. 1, 2 and 47.
[13] *Ullmann* v. *U. S.*, 350 U.S. 422 (1956).
[14] See transcript of proceedings June 18, 1970.
[15] *U. S.* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).
[16] See Appellants' Brief 31.

A tenant is not deprived of his right to assert those claims which are not relevant defenses in an eviction action. A tenant may assert all other claims which he may have against his landlord in an action against the landlord for breach of the lease, or as defenses in an action brought by the landlord to collect unpaid rent, utility bills or mechanics' liens against the property, damage to the leased property, or for breach of any other provision of the lease agreement between the landlord and tenant. Nor is an indigent tenant compelled by economics to forego asserting claims against his landlord by reason of Oregon's eviction procedure. The indigent tenant need only continue to pay the landlord the rent due him as it becomes due if he wishes to retain possession of the leased property and file an action against his landlord asserting such claims. The tenant need pay no more than that which he obligated himself to pay when he rented the property from his landlord.

This Court has held that a state can, consistent with the Due Process clause of the Fourteenth Amendment to the U. S. Constitution, provide a separate summary proceedings to determine just the right to possession of property and exclude therefrom other claims and defenses which the occupant may have against the owner of the property.[17]

A landlord can not be deprived of his right to evict a tenant on the pretense that it is necessary to assure compliance with the Code of the City of Portland, Ore-

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[17] *Bianchi* v. *Morales*, 262 U.S. 170 (1923).

gon. Section 29.28.010(a) of the Code of the City of Portland, Oregon, authorizes the Building Inspections Director to order the owner or occupant of a residence to correct substandard conditions existing in the residence within a specified period of time. If the substandard conditions are not corrected as directed, the Building Inspections Director is authorized to proceed with the enforcement of the penal provisions under the code, and proceed with the condemnation and demolition of the building.[18] There is no evidence in this case that the City of Portland has been derelict in its duty to enforce its housing code. The evidence is to the contrary. The Director of Building Inspections of the City of Portland ordered appellants and appellee to vacate the residence due to existing substandard conditions.[19] The Due Process clause of the Fourteenth Amendment to the U. S. Constitution does not compel all state statutes to aid enforcement of housing codes.

Under the Code of the City of Portland, Oregon, the landlord is given the right to elect whether to repair the substandard conditions existing in the residence, or allow the residence to be vacated, condemned and demolished. Often times the cost of repairing a residence to comply with the housing code would exceed the value of the residence after it is repaired. Also, the landlord may desire to use the property for

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[18] See Code of the City of Portland, Oregon, Sections 14.08.010 and 29.28.010 (b) and (c), Appendix "B" to Motion of Appellee Normet to Dismiss or in the Alternative Affirm.

[19] See A. 43.

other than residential purposes. If the tenant can defeat an eviction action by showing that housing code violations exist in the residence, the landlord would be deprived of this right to determine the use of his property.

3. The minimum allegations required in an eviction complaint by Or. Rev. Stat. § 105.125(3) give a tenant sufficient notice of the alleged grounds for eviction that the statute does not violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.

Or. Rev. Stat. § 105.125(3) requires as the minimum allegations necessary to state a cause of action for eviction, a description of the premises, and allegations that the tenant is in possession of the premises, that the tenant unlawfully holds the premises with force, and that the landlord is entitled to possession. The complaint must also contain a prayer for the relief requested.[20]

The term "unlawful holding by force" is specifically defined in Or. Rev. Stat. § 105.115 as failing to pay rent within 10 days after the date due, or remaining in possession of the property after expiration of a lease or after receipt of notice to vacate. These grounds for eviction are common knowledge among tenants as well as landlords. The tenant in every conceivable instance has knowledge equal to that of the landlord of the facts constituting the ground for eviction. The tenant knows whether he has paid his rent, whether his lease has expired, or whether he has received notice to vacate the property.

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[20] Or. Rev. Stat. § 16.210(2).

The minimum allegations required by Or. Rev. Stat. § 105.125 adequately advise the tenant that his landlord is seeking to recover possession of property which the tenant possesses, and that his landlord bases his right to possession of the property on the tenant's failure to pay rent within 10 days after it was due, the expiration of his lease, or the receipt by the tenant of the statutory notice to vacate. Which of the alternative grounds the landlord is asserting is within the knowledge of the tenant in every conceivable case.

The U. S. District Court for the District of Oregon in the proceeding below found: "The pleadings required by the challenged statute [Or. Rev. Stat. § 105.125(3)] are at least as informative as those required by the Federal Rules of Civil Procedure."[21] The court held that the notice required by Or. Rev. Stat. § 105.125(3) was not unreasonably vague in view of the nature of the typical eviction case. The court noted that to require additional allegations in an eviction complaint would tend to elevate form over substance.[22]

4. The period of time between the service of summons and the trial of an eviction action as prescribed by Or. Rev. Stat. §§ 105.135 and 105.140 provide a tenant sufficient time within which to prepare his defense, and do not violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.

Or. Rev. Stat. § 105.135 provides for a two to

[21] A. 75.
[22] A. 75.

four day period between the service of summons and the trial of the eviction action. Or. Rev. Stat. § 105.140 provides for a continuance of the two to four day period for an additional two days without the posting of security, and for an unlimited continuance upon the condition that the tenant file an undertaking with such security as the court may approve to the effect that the tenant will pay the landlord the rent accruing during the period of the requested continuance if judgment is ultimately rendered against the tenant. The statutes expressly allow a continuance where an undertaking is provided, and do not limit to six days the period within which a tenant has to prepare his defense as appellants contend.

The appellants' statement that in the usual case the tenant is served on Friday and trial is on Monday afternoon is untrue and not supported by any evidence. None of the three cases filed against plaintiffs in this case was served on Friday. Colton was served on a Monday; trial was set for the following Friday. Oetting was served on a Wednesday; trial was set on the following Monday. Lowe was served on a Tuesday; trial was set on the following Friday. In each case the trial was continued.[23] Neither is appellants' statement that a tenant has difficulty in finding a lawyer to appear in court and request a continuance on two or four days' notice true nor supported by any evidence.

Since a tenant can file a personal undertaking,

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[23] Supra, Note 11.

and deliver to the court as security the rent which would accrue during the period of the continuance requested, a tenant must pay or provide security for no more than he would have had to pay the landlord as rent had the eviction action not been filed.

The Due Process clause of the Fourteenth Amendment requires only that a party be given reasonable notice of the action filed against him and reasonable opportunity to appear and assert his defenses.[24] In determining whether notice and the opportunity to defend are reasonable, the court must consider the nature of the proceedings.[25]

In an eviction action the only questions presented are whether the landlord or the tenant has the legal right to possession of the property, and defenses which are relevant to the question of who has the legal right to possession of the property. The only grounds which a landlord can assert are that the tenant failed to pay the rent within 10 days after it was due, or that the tenant failed to vacate the property after termination of his lease or notice to vacate. The limited issues presented in the usual eviction case require as proof evidence which is not difficult or complex and which is equally available to the landlord and tenant. In addition the tenant is not required to file a written answer.

In an eviction action, prior to receipt of summons the tenant has at least an additional 10 days' notice of eviction in the case of eviction for nonpayment of

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[24] *Dohany* v. *Rogers*, 281 U.S. 362 (1930).
[25] Id. at 369.

rent, and at least an additional 30 or more days' notice in the case of eviction because of termination of lease or notice to vacate. These periods are available for the tenant to prepare his defense for it is inevitable that a landlord will file an action to evict a tenant who has failed to pay rent or who has failed to vacate the premises upon termination of his lease or after receipt of notice to vacate. Therefore, in considering the usual case brought under Oregon's eviction law, the tenant is not deprived of sufficient time within which to adequately prepare his defense, and the statutes do not violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.[26]

5. The appeal bond required by Or. Rev. Stat. § 105.160 is not so unreasonable as to violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.

Or. Rev. Stat. § 105.160 requires as a condition for an appeal by a tenant from a judgment in favor of the landlord that he file an undertaking to pay twice the rental value of the property from the commencement of the case to the final judgment should the landlord prevail in the appeal.[27] The statute does not require a corporate surety bond, a personal undertaking is sufficient. Since the final judgment in an action brought under Oregon's eviction law cannot include a judgment for rent, for damage to the property, or for damages for wrongful holding over, the

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[26] *Dohany* v. *Rogers*, Supra, Note 24.
[27] Or. Rev. Stat. § 105.160.

requirement of such an undertaking is not so unreasonable as to violate the Due Process clause of the Fourteenth Amendment of the U. S. Constitution.[28]

The Oregon Supreme Court in the *Scales* case noted that the bond for double the rental value of the property was reasonable as liquidated damages for rent, waste, and wrongful holding over, and to prevent frivolous appeals by a tenant who would otherwise have nothing to lose by appealing an eviction judgment against him. If the tenant was only required to post security for the payment of rent during the period of the case, the tenant could defeat the effect of the eviction judgment for a year or more by merely appealing the case to the Oregon Supreme Court. Security requirements have been upheld by this Court as not in violation of the Due Process or Equal Protection clauses of the U. S. Constitution where they are reasonable.[29]

The fact that Or. Rev. Stat. § 19.040(1)(b) requires an undertaking on appeal in cases involving the possession of real property does not adequately protect the landlord as it applies only in appeals from the circuit courts to the Court of Appeals or Supreme Court of the State of Oregon. Or. Rev. Stat. §§ 46.250 and 53.040 apply with regard to appeals from the district court to the circuit court. Or. Rev. Stat. § 53.040 requires only that the appellant provide an undertaking to the effect that appellant will satisfy

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[28] *Scales* v. *Spencer*, 246 Or. 111, 424 P.2d 242 (1967).

[29] *Cohen* v. *Beneficial Industrial Loan Corp.*, Supra, Note 5.

any judgment that may be given against him in the appellate court on the appeal. This is not satisfactory, as the landlord in an action brought under Oregon's eviction law is not permited a judgment for the rent accruing during the period of the pendency of the case nor a judgment for damages for waste or wrongfully withholding the premises from him.

Appellants' contention that the trial before the District Court of the State of Oregon is rendered an unconstitutional trial merely because the court is not a court of record and the appellant has the right to appeal to the Circuit Court of the State of Oregon and obtain a trial de novo has been rendered moot by the enactment of Sections 4 and 7, Chapter 623, Oregon Laws 1971. Section 4 provides that a District Court of the State of Oregon is a court of record. Section 7 provides that the appeal to Circuit Court of the State of Oregon is heard on that record and is reviewed only as to questions of law appearing upon the record.[30]

CONCLUSION

The Court should affirm the U. S. District Court's judgment dismissing this case on the grounds that Oregon's eviction law, Or. Rev. Stat. §§ 105.105-.160, does not violate the Equal Protection or Due Process clauses of the Fourteenth Amendment to the U. S. Constitution.

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[30] See Appendix "B."

The characteristics which are unique to the landlord-tenant relationship and the statutory prohibition against forcibly taking possession of real property are sufficient justification for the State of Oregon to establish an added procedure for obtaining a court determination as to who has the legal right to possession of real property without the delays of the ordinary litigation process. The limiting of the eviction action to the consideration of only the right to possession and relevant defenses and the limiting of the time available without providing security are reasonably necessary to accomplish the objective of the eviction law. Oregon's eviction law does not therefore violate the Equal Protection clause.

Oregon's eviction law allows the tenant to assert in an eviction action all defenses which are relevant to the issue of who has the legal right to possession of the property. The law does not procedurally nor practically prohibit a tenant from asserting all other claims or defenses which he may have against his landlord in a separate action against him. The notice required by the Oregon eviction law, the hearing, and time provided to prepare for the hearing are reasonable in light of the limited issues considered, the availability of the proof and the facts of the usual case. The Oregon eviction law does not thereby deprive the tenant of the Due Process of law guaranteed by the U. S. Constitution.

The appeal bond required by Or. Rev. Stat. § 105.160 is not so unreasonable that it deprives a tenant of the Due Process of law guaranteed by the

U. S. Constitution. The landlord cannot avail himself of the eviction procedure and join a claim for rent, damage to the rented property, or damages for wrongfully withholding the property. Therefore, it is reasonable to provide the landlord with security for double the rental value of the property during the appeal as liquidated damages for these potential claims.

Respectfully submitted,

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APPENDIX "A"

Or. Rev. Stat. § 91.070. Tenancy from month to month. One who holds the lands or tenements of another, under the demise of the other, and no certain time has been mentioned, but a monthly rental has been reserved, is considered a tenant from month to month. Except as otherwise provided by statute or agreement, such tenancy may only be terminated by either the landlord or tenant giving the other, at any time during the tenancy, not less than 30 days' notice in writing prior to the date designated in the notice for the termination of the tenancy. The tenancy shall terminate on the date designated and without regard to the expiration of the period for which, by the terms of the tenancy and holding, rents are to be paid.

Or. Rev. Stat. § 91.080. Termination when expiration of tenancy fixed by terms of lease. A tenant entering into the possession of real estate may, by the terms of his lease, fix the date of expiration of his tenancy, and when so fixed, no notice is required to render the holding of the tenant wrongful and by force after the expiration of his term as fixed by his lease.

Or. Rev. Stat. § 91.090. Termination of tenancy by failure to pay rent; reinstatement. The failure of a tenant to pay the rent reserved by the terms of his lease for the period of 10 days, unless a different period is stipulated in the lease, after it becomes due and payable, operates to terminate his tenancy. No

notice to quit or pay the rent is required to render the holding of such tenant thereafter wrongful; however, if the landlord, after such default in payment of rent, accepts payment thereof, the lease is reinstated for the full period fixed by its terms, subject to termination by subsequent defaults in payment of rent.

APPENDIX "B"

CHAPTER 623, OREGON LAWS 1971, AN ACT Relating to the administration of justice, including but not limited to district courts; creating new provisions; amending ORS 46.060, 46.070,

* * *

SECTION 4. (1) A district court is a court of record whose judgments and decrees have the same force and effect and may be pleaded in the same manner as judgments and decrees of a circuit court.

(2) ORS 18.310 to 18.370 and 18.400 to 18.430 apply to judgments and decrees of a district court.

* * *

SECTION 7. (1) Within 30 days after filing notice of the appeal, the appellant shall cause a record of the case to be filed with the clerk of of the circuit court. The record shall include a copy of all the material entries in the docket of the district court relating to the cause and the appeal, and all the original papers relating to the cause and the appeal and filed with the district court. The record may include such report, transcript prepared by an individual reporter

or transcript electronically reported, or statement of the proceedings in the district court as authorized by and prepared pursuant to law and to rules made by the district court, which rules shall be substantially uniform throughout the state and approved by the Supreme Court.

(2) If the record of the case is not filed within the time provided, the circuit court, within the time provided for that filing, may by order extend the time for the filing upon such terms as the circuit court considers just.

(3) The circuit court by rule shall establish procedure for the filing of written briefs and the presentation of oral argument on such case.

(4) The appeal shall be heard and determined by the circuit court on that record. Upon an appeal from a judgment, the judgment shall be reviewed only as to questions of law appearing upon the record, and shall be reversed or modified only for errors substantially affecting the rights of the appellant. Upon an appeal from a decree, the suit shall be tried anew upon the record.

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IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,

Appellants,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR APPELLANTS

INTRODUCTION

Most of the arguments raised in Appellee's brief are covered by the arguments and authorities in Appellants' opening brief. In this reply brief, appellants will respond to the major new arguments and authorities mentioned in Appellee's brief. In addition, we will indicate some recent authorities which support our opening brief.

ARGUMENT

I. APPELLEE'S "STATEMENT OF THE CASE" IS MISLEADING.

Appellee's "Statement of the Case" tends to create two impressions: (1) that this appeal is almost moot, since the case was dismissed as to all issues between the other plaintiffs and their respective defendants; and (2) that appellants are raising issues (such as retaliatory eviction) on appeal for the first time. Both notions are incorrect.[1]

As to the first, Appellee overlooks the fact that this case was approved by the district court as a class action. The district court defined the class as "all persons in the State of Oregon who are, have been, or may be affected by the operation of Oregon Revised Statute, Sections 105.105, *et seq.*" Appendix, P. 33; 72 *Moore v. Ogilvie*, 394 U.S. 814 (1969). *Cf. Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). Furthermore, the statement simply is not true since although the respective defendant landlords were dismissed through settlements, the named plaintiffs remained in the case to litigate their claims against the defendant Judges of the District Court of the State of Oregon. See caption of opinion and judgment. A. 72, 79 and Pre-Trial Order A. 46, 48, 49. Note particularly part "G" of the Pre-Trial Order A. 49-50.

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[1] Appellees also went into an extensive digest of the facts. This was unnecessary since they were stipulated to in the lower court Pre-trial Order. A. 42-50. Furthermore the lower court did not feel this was necessary since "All material facts are stipulated. For the purposes of testing the constitutionality of O.R.S. 105.105, *et seq.*, it is not necessary to decide whether the tenants grievances are well founded. We will assume that one or more maybe." A. 73. An observation is in order on Appellee's recitation of the facts. Appellee would appear to be attempting to assert that a landlord-tenant relationship did not exist between the Lindseys and appellee, Normet. It was specifically held by the lower court that such a relationship did exist between the parties. A. 71. There has been no cross appeal filed to raise this as an issue in this appeal rendering discussion of those facts irrelevant. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937).

As to the second, two points should be noted. First, the issue of retaliation against tenants because of receipt of welfare benefits was raised below. Appendix, p. 49. It was also very much before the lower court as an obvious issue that would have been raised in the Lindsey's case were a trial to be held on the merits in the State courts. R. Pl. Ex. No. 14. Often the specific issue of retaliatory eviction for reporting code violations is obfuscated by the concurrent attempt to withhold rent as in the Lindsey's case and the case of Bonnie Colton. A. 45-46. Second, appellee fails to recognize that the issue presented in this appeal is not whether a particular defense (such as retaliatory eviction) should be *allowed*, but whether defenses such as these must be *heard* and accepted or rejected on their legal and factual merits. This was made clear at pages 27-28 of our opening brief. This important distinction was overlooked throughout Appellee's brief.[2]

II. THE CONSTITUTION REQUIRES THAT TENANTS BE PERMITTED TO ASSERT DEFENSES IN THE EVICTION ACTION ITSELF.

At several points in his brief, Appellee appears to argue that the Due Process and Equal Protection Clauses do not require the Oregon courts to hear defenses in FED actions, as the tenant may assert any "claims" he may have against his landlord in another action. See, e.g., Appellee's brief, pp. 7, 14. There are three answers to this.

First, Appellee cites no Oregon authorities allowing tenants relief of any sort for the types of grievances mentioned in Appellants' opening brief. Nor are we aware of any such authorities. No Oregon statutes or case law permit tenants to sue for damages where landlords refuse to comply with

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[2]See e.g., Appellee's brief, p. 15: "The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution does not compel all state statutes to aid enforcement of housing codes." Appellants have made it clear that they are making no such claim.

housing codes or to keep a dwelling even minimally habitable or where landlords impose retaliatory evictions or rent increases to punish tenants for exercise of their lawful rights.[3]

Second—and more important—is the fact that even if such relief by way of damages were provided, this would not be an adequate substitute for the matter at issue in the FED action, the tenant's right to retain possession of his home. It is well established that land is unique, and that the right to possession or ownership of it cannot be easily satisfied with money damages. Walsh on Equity, § 59 (1930). More recently, our courts have recognized that the right of a tenant to retain possession of his home is constitutionally protected. See the authorities cited in Appellants' opening brief. pp. 19-20. In none of those cases was the tenant denied the right to assert his defense in the eviction action and relegated to a later damage action after the injury is suffered. As shown in our opening brief, the defenses which tenants wish to assert in the Oregon state courts have been found by courts in other jurisdictions to be quite relevant to the issue of possession. All we ask is that Oregon courts consider these defenses on their legal and factual merits in the FED action itself. If they are rejected because they are based upon unsound reasoning, invalid assumptions, or lack of proof, fine, but to refuse to even hear these defenses and thereupon deprive the tenant of his home violates the Constitution.

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[3] Assuming, *arguendo*, the assertion of claims in other affirmative actions were allowed under Oregon law, it would present the hollowest of all remedies since, under the present state of the law, the landlord could evict the tenant in retaliation and the Oregon Courts could do nothing to prevent the use of the eviction procedure which automatically requires entry of judgment if the technicalities are correct. Therefore, by permitting this procedure to stand, the tenant stands stripped of any forum to vindicate whatever rights he may have. Such a situation is clearly unconstitutional. See *General Oil Co. v. Crain*, 209 U.S. 211 (1908). Futhermore a tenant has the option to either assert his right affirmatively or stand in a defensive posture. This right of election of alternative routes cannot be denied by the state. See *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

It is for these reasons that *Bianchi v. Morales*, 262 U.S. 170 (1923), cited by Appellee in his brief at p. 14, is distinguishable. That case involved the validity of a Puerto Rico statute which provided a summary action for mortgage foreclosure in which the permissible defenses were limited. (Unlike the present case, the statute in *Bianchi* was challenged only on due process grounds. Apparently, no equal protection argument was made). In upholding the validity of the statute under the due process clause, the Court was careful to point out that Puerto Rico did allow a separate action to annul the mortgage, in which any defense to the mortgage could be asserted. Such an alternative is lacking in the present case.[4]

III. *COHEN v. BENEFICIAL INDUSTRIAL LOAN CORP.* DOES NOT SUPPORT APPELLEE'S POSITION.

At page 7 of his brief, Appellee asserts that the procedure established in Oregon for resolving possession disputes between landlord and tenant "accomplishes the objective of the law in a reasonable manner," and therefore does not violate the Equal Protection clause. Cited in support of this proposition is *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Appellee again cites this case on page 21 to support his argument that "security requirements," such as Oregon's double rent appeal bond requirement, have been upheld by this Court. We contend that *Cohen* does

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[4]In addition, it appears from reading *Bianchi* that the main or only challenge to the Puerto Rico statute was that it did not permit the mortgagor to assert in the foreclosure action claims of "ultimate right," i.e., that someone else's title was superior to that of the mortgagee. No such claim is made in the present case. We do not claim any right to challenge the landlord's title in a FED action. Also, it should be noted that since *Bianchi* was decided, this Court has rendered several decisions emphasizing the citizen's right under the due process clause to an adequate hearing before being deprived of a substantial right. See e.g., *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969); *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Bell v. Burson*, 402 U.S. 535 (1971).

not support Appellee's position, while it does support ours. *Cohen* involved the constitutionality of a New Jersey statute which required certain minority stockholders bringing derivative actions to post security for "the reasonable expenses, including counsel fees, which may be incurred" by the defendants. (*Id.* at 552.) The amount of the security was subject to increase or decrease during the litigation to conform the new information as to what costs were likely to be actually incurred. In upholding the constitutionality of this requirement, the Supreme Court stressed the fact that the statute was designed to insure that the amount of the security would be reasonably related to expenses likely to be actually incurred by the defendants. Obviously, the same cannot be said of the Oregon double rent appeal bond requirement. As we pointed out in our opening brief, at pages 40-41, there is no rational relationship between a need to compensate some landlords for waste and damages actually incurred and a practice of giving every landlord double rent (no more and no less), regardless of expenses incurred.

IV. OREGON'S DOUBLE RENT APPEAL BOND REQUIREMENT DENIES TENANTS DUE PROCESS OF LAW.

In our opening brief, we compared Oregon's appeal bond statute applicable to tenants, ORS § 105.160, with that generally applicable to other litigants, ORS § 19.040, in order to show that the former unncessarily imposes harsh restrictions not imposed by the latter. (See Appellants opening brief, pp. 38-42.) At page 21 of his brief, Appellee correctly points out that the landlord who brings his action in district court would not be protected by § 19.040, which applied only to appeals from the circuit court. Therefore, some statements on pages 40-41 of our opening brief, regarding how the landlord maybe already protected by § 19.040 for rent and damages accruing during the appeal, do not apply to the landlord who brings his action in district court pursuant to ORS § 46.060 rather than in circuit

court pursuant to Or. Const., Art. VIII, § 9. Appellee is also correct in stating (on pages 21-22) that were it not for § 105.160, the double rent appeal bond statute, the landlord defending an appeal from district court would be protected only by § 53.040, which would require that in order for the tenant to stay in possession during the appeal, he would have to post a bond for the judgment and costs, but not also for any rent or damages accruing during the appeal.

Nevertheless, we still contend that § 105.106 is constitutionally deficient, on both equal protection and due process grounds, for the reasons set out in our opening brief. The double rent bond requirement of § 105.160 is unreasonably harsh and not related to any legitimate legislative purpose. This is particularly true where the broad equity powers of the Circuit Court would permit the entry of protective orders to preserve the *status quo*. See Appellant's Brief at 61. If the Oregon legislature decides that Appellee's concerns about § 53.040 are valid and decides to impose a *reasonable* bond requirement, such as § 19.040, to protect landlords defending appeals from district court, so be it. We would see no constitutional objection to this. But this is not the present situation. The double rent bond requirement of § 105.160 is currently imposed on all tenants appealing from district court. It goes far beyond what is reasonably needed to protect the landlord's interests, and it should be struck down.

V. RECENT AUTHORITIES

Since we prepared our opening brief, we have discovered several recent authorities which support our arguments.

In the wake of *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969), have been several state court cases extending the principles enunciated in *Sniadach* to strike down prejudgment garnishment, attachment, and replevin statutes which did not provide for an adequate prior hearing. See *Randone v. Appellate Dept.*, 5 Cal.3d, ___ P.2d ___ (1971); *Blair v. Pitchess*, 5 Cal.3d 258, 486 P.2d 1242 (1971); *Jones Press*,

Inc. v. Motor Travel Service, Inc., 286 Minn. 205, 176 N.W. 2d 87 (1970); *McCallop v. Carberry*, 1 Cal.3d 903, 464 P.2d 122 (1970); *Larson v. Fetherston*, 44 Wis.2d 712, 172 N.W. 2d 70 (1969).

Federal courts have begun to accept constitutional challenges to state appeal bond requirements in eviction cases. See *Razos v. Drusina*, 440 F.2d 795 (5th Cir., 1971); *Hayes v. Fellowship Gardens, Inc.*, C.C.H. Pov. L. Rep. ¶ 13,745 (D.C. Ind., 1971).

Finally, while Appellee argues that a double rent appeal bond statute is essential to protect the landlord's interests, the Legislatures of Massachusetts and Georgia have recently decided that stringent appeal bond requirements are not necessary. Mass. Gen. Laws, Chapter 239, § 5, now provides that the courts may waive the appeal bond requirement if the tenant shows that the appeal is not frivolous and that he is not financially able to post the bond. Georgia Code Ann. § 61-306 now provides that the tenant may appeal without posting a bond so long as he pays his monthly rent into court as it comes due.

CONCLUSION

Appellee has not provided a convincing rebuttal to the arguments set out in Appellants' opening brief. The arguments presented by Appellants are meritorious, and the judgment should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY et al,
Appellants,
v.
DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah,
Appellees.

On Appeal from the United States District Court for the District of Oregon

SUPPLEMENTAL BRIEF OF APPELLEE NORMET

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SUPPLEMENTAL BRIEF OF APPELLEE NORMET

NEWLY ENACTED LEGISLATION

Since the preparation of the Brief of Appellee Normet, the City Council of the City of Portland, Oregon, on September 23, 1971, adopted the ordinance referred to on page 11 of Appellee Normet's brief. The ordinance, Number 133390, is set forth as Appendix "A" to this Supplemental Brief.

Ordinance No. 133390 prohibits and makes it unlawful to rerent a dwelling if vacated after notice of

Code violations. A landlord cannot rerent the dwelling until he has corrected the Code violations and has obtained the Inspection Approval or Certificate of Compliance from the Bureau of Buildings of the City. Ordinance No. 133390 makes such acts a violation of the Housing Code and subjects the landlord to the criminal penalties of § 14.08.010 of the Code.

Ordinance 133390 prohibits the landlord from re-renting a substandard dwelling to another tenant who would agree to rent the dwelling as is and not advise the Director of Building Inspections of the City of Portland of the code violations.

Ordinance 133390 is additional evidence that the City of Portland, Oregon, does enforce its housing codes, with the elimination of substandard dwellings as its ultimate goal.

Enforcement of the housing codes accomplishes the desired result while preserving the landlord's right to determine the use of his property.

The eviction laws of Oregon are constitutional and the procedure established by them should not be eliminated as urged by the Appellant.

Respectfully submitted,

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APPENDIX A

ORDINANCE NO. 133390

An Ordinance amending the Code of the City of Portland by adding identical sections to Title 26, Electrical Regulations, to Title 29, Housing Regulations, and to Title 31, Fire Regulations, so as to prohibit occupancy for dwelling purposes following vacancy after notice of code violation.

The City of Portland ordains:

Section 1. The Council finds that in cases where code violations have been discovered and the City has notified the owner or occupant that corrections or alterations are required, protection should be afforded to subsequent occupants to protect the public safety and health; now, therefore, Chapter 26.04 of Title 26, Electrical Regulations of the Code of the City of Portland, Oregon, hereby is amended by adding thereto a new section to be numbered, entitled and to read as follows:

Section 26.04.055 OCCUPANCY FOR DWELLING PURPOSES AFTER NOTICE OF VIOLATION. After notice of violation of any one or more of the provisions of this title, if the premises affected become vacant, it is unlawful to occupy or permit occupancy of such premises for dwelling purposes until the necessary permits are obtained, corrections or alterations are made and inspection approval or certificate of compliance has been issued by the city. If

an appeal is taken from such notice and the notice is modified upon the appeal, this section shall apply to the violation set forth in the modified notice.

Section 2. Chapter 29.04 of Title 29, Housing Regulations of the Code of the City of Portland, Oregon, hereby is amended by adding thereto a new section to be numbered, entitled and to read as follows:

Section 29.04.055 OCCUPANCY FOR DWELLING PURPOSES AFTER NOTICE OF VIOLATION. After notice of violation of any one or more of the provisions of this title, if the premises affected become vacant, it is unlawful to occupy or permit occupancy of such premises for dwelling purposes until the necessary permits are obtained, corrections or alterations are made and inspection approval or certificate of compliance has been issued by the city. If an appeal is taken from such notice and the notice is modified upon the appeal, this section shall apply to the violations set forth in the modified notice.

Section 3. Chapter 31.20 of Title 31, Fire Regulaitons of the Code of the City of Portland, Oregon, hereby is amended by adding thereto a new section to be numbered, entitled and to read as follows:

Section 31.20.015 OCCUPANCY FOR DWELLING PURPOSES AFTER NOTICE OF VIOLATION. After notice of violation of any one or more of the provisions of this title, if the premises affected become vacant, it is unlawful to occupy or permit occupancy of such premises for dwelling purposes until

the necessary permits are obtained, corrections or alterations are made and Inspection Approval or Certificate of Compliance has been issued by the city. If the appeal is taken from such notice and the notice is modified upon the appeal, this section shall apply to the violations set forth in the modified notice.

LINDSEY ET AL. *v.* NORMET ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. 70-5045. Argued November 15, 1971—
Decided February 23, 1972

Appellants, month-to-month tenants of appellee Normet, refused to pay their monthly rent unless certain substandard conditions were remedied, and appellee threatened eviction. Appellants filed a class action seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer (FED) Statute was unconstitutional on its face, and an injunction against its continued enforcement. Appellants attacked principally (1) the requirement of trial no later than six days after service of the complaint unless security for accruing rent is provided, (2) the limitation of triable issues to the tenant's default, defenses based on the landlord's breach of duty to maintain the premises being precluded, and (3) the requirement of posting bond on appeal, with two sureties, in twice the amount of rent expected to accrue pending appellate decision, this bond to be forfeited if the lower court decision is affirmed. The District Court granted the motion to dismiss the complaint, concluding that the statute did not violate the Due Process or the Equal Protection Clause. *Held:*

1. Neither the early-trial provision nor the limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment. Pp. 64–69.

(a) The time for trial preparation is not unduly short where the issue is simply whether the tenant has paid or has held over, and the requirement for rent security for a continuance of the action is not irrational or oppressive. Pp. 64–65.

(b) Appellants are not denied due process because rental payments are not suspended while the alleged wrongdoings of the landlord are litigated, as Oregon may treat the tenant's undertakings and those of the landlord as independent covenants. P. 68.

(c) Appellants are not foreclosed from instituting suit against the landlord and litigating their right to damages and other relief in that action, nor have they shown that Oregon excludes any "available" defenses on the limited questions at issue in an FED suit. Pp. 65–66, 69.

2. Neither the early-trial provision nor the limitation on litigable issues is invalid on its face under the Equal Protection Clause. Pp. 69–74.

(a) The State has the power to implement its legitimate objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant by enacting special provisions applicable only to such disputes. Pp. 70–73.

(b) Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative function. P. 74.

3. The double-bond prerequisite for appealing an FED action does violate the Equal Protection Clause as it arbitrarily discriminates against tenants wishing to appeal from adverse FED decisions. It heavily burdens the statutory right of an FED defendant to appeal and is not necessary to effectuate the State's purpose of preserving the property at issue. Pp. 74–79.

Affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., *post*, p. 79, and BRENNAN, J., *post*, p. 90, filed opinions dissenting in part. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of this case.

John H. Clough argued the cause for appellants. With him on the briefs was *Myron Moskovitz*.

Theodore B. Jensen argued the cause for appellee Normet. With him on the briefs was *Donald J. DeFrancq*.

Briefs of *amici curiae* urging reversal were filed by *Delane C. Carpenter* for the Pima County Bar Assn.; by *Howard W. Dixon*, *Bruce S. Rogow*, and *Steven Rappaport* for Legal Services of Greater Miami, Inc.; by *Helen S. White* and *Gerald D. McGonigle* for New Hampshire Legal Assistance; by *W. J. Michael Cody III* for Memphis and Shelby County Legal Services Assn., Inc.; by *Elizabeth M. Brooks* for June Brooks; by *Paul L. McKaskle* for Western Center on Law and Poverty; by *Martin R. Glenn* and *John G. O'Mara* for Legal Aid Society of Louisville; by *Andrea M. Alcarese* for Legal

Aid Bureau, Inc.; by *Nancy E. LeBlanc* for Community Action for Legal Services, Inc., et al.; and by *Franklin Arthur Martens* for Allen County Legal Aid Society et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether Oregon's judicial procedure for eviction of tenants after nonpayment of rent violates either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment.

The material facts were stipulated. Appellants were the month-to-month tenants of appellee Normet [1] and paid $100 a month for the use of a single-family residence in Portland, Oregon. On November 10, 1969, the City Bureau of Buildings declared the dwelling unfit for habitation due to substandard conditions on the premises.[2] Appellants requested appellee to make certain repairs which, with one minor exception, appellee refused to do. Appellants, who had paid the November rent, refused to

[1] The original complaint was filed on behalf of Donald and Edna Lindsey, seven other named plaintiffs (one of whom was an intervenor), and all other persons similarly situated. Permission to maintain the suit as a class action was granted, App. 33, but the class was not further defined. The other named plaintiffs raised claims essentially similar to the Lindseys, who were the only two plaintiffs to appeal and who are hereafter termed "appellants." Appellee Normet was the owner of the seller's interest in the property rented to the appellants and held the legal title to secure the purchaser's performance of the contract of sale. An assignee of the purchaser's interest in the contract had rented the residence to appellants. The trial court found, however, that there was a landlord-tenant relationship between appellee and appellants at the time the suit was filed. App. 71.

[2] It was stipulated that city inspectors found rusted gutters, broken windows, broken plaster, missing rear steps, and improper sanitation, all in violation of the Portland Housing Code, and that the inspectors posted a notice that the dwelling was required to be vacated within 30 days unless the owner could show cause why the building should not be declared unfit for occupancy. App. 43.

pay the December rent until the requested improvements had been made. Appellee's attorney wrote a letter on December 15 threatening to "get a Court Order out on this matter" unless the accrued rent was immediately paid.

On January 7, 1970, however, before statutory eviction procedures were begun in the Oregon courts, appellants filed suit in federal district court under 42 U. S. C. § 1983 seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer (hereinafter FED) Statute, Ore. Rev. Stat. (ORS) §§ 105.105–105.160,[3] was

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[3] In its entirety, the Oregon Forcible Entry and Wrongful Detainer Statute provides:

"FORCIBLE ENTRY AND WRONGFUL DETAINER

"105.105 Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force.

"105.110 Action for forcible entry or wrongful detainer. When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.

"105.115 Causes of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

"(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement under which he holds, or to deliver possession of the premises after being in default on payment of rent for 10 days.

"(2) When the lease by its terms has expired and has not been renewed, or when the tenant or person in possession is holding from month to month, or year to year, and remains in possession after notice to quit as provided in ORS 105.120, or is holding contrary to any condition or covenant of the lease or is holding possession without any written lease or agreement.

"105.120 Notice necessary to maintain action in certain cases; waiver of notice; effect of advance payments of rent. (1) An action

unconstitutional on its face and an injunction against its continued enforcement. A three-judge court was convened under 28 U. S. C. § 2281, a temporary restraining

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for the recovery of the possession of the premises may be maintained in cases provided in subsection (2) of ORS 105.115, when the notice to terminate the tenancy or to quit has been served upon the tenant or person in possession in the manner prescribed by ORS 91.110 and for the period prescribed by ORS 91.060 to 91.080 before the commencement of the action, unless the leasing or occupation is for the purpose of farming or agriculture, in which case such notice must be served for a period of 90 days before the commencement of the action.

"(2) Any person entering into the possession of real estate under written lease as the tenant of another may, by the terms of his lease, waive the giving of any notice required by this section.

"(3) The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against him for the possession of premises before the expiration of any period for which the tenant or person has paid the rent of the premises in advance.

"105.125 Complaint. In an action pursuant to ORS 105.110 it is sufficient to state in the complaint:

"(1) A description of the premises with convenient certainty;

"(2) That the defendant is in possession of the premises;

"(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

"(4) That the plaintiff is entitled to the possession of the premises.

"105.130 How action conducted. Except as provided in ORS 105.135 to 105.160, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

"105.135 Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

"105.140 Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

"105.145 Judgment on trial by court. If the action is tried by

order was issued against the enforcement of the FED Statute, and appellants were ordered to make their rent payments into an escrow account during the pendency of

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the court without a jury, and after hearing the evidence it concludes that the complaint is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable.

"105.150 Verdict and judgment on trial by jury. If the action is tried by a jury and they find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, they shall render a general verdict of not guilty; if true in part, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict.

"105.155 Form of execution. The execution, should judgment of restitution be rendered, may be in the following form:

State of Oregon, }
County of ——— } ss.

To the sheriff or any constable of the county:

Whereas, a certain action for the forcible entry and detention, (or the forcible detention) of the following described premises, to wit: ———————, lately tried before the above entitled court, wherein ——————— was plaintiff and ——————— was defendant, judgment was rendered on the —— day of ——, A. D., ——, that the plaintiff ——————— have restitution of the premises, and also that he recover the costs and disbursements in the sum of $———;

In the name of the State of Oregon, you are, therefore, hereby commanded to cause the defendant and his goods and chattels to be forthwith removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and

the District Court proceeding. A lengthy stipulation of facts was agreed upon, a number of exhibits and depositions were submitted, and the District Court then granted appellees' motion to dismiss the complaint,[4] after concluding that the statute was not unconstitutional under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.[5] Appel-

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chattels of the defendant, and make the costs and disbursements, aforesaid, and all accruing costs, and to make legal service and due return of this writ.

Witness my hand and official seal (if issued out of a court of record) this —— day of ——, A. D., ——.

Justice of the peace, or clerk of the district or circuit court.

"'105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action."

[4] Civ. No. 70–8, Sept. 10, 1970, D. Ore. (unreported). Reprinted at App. 72.

[5] The District Court correctly declined to abstain from considering the constitutionality of the FED statute since: "The challenged statute is clear. It is unlikely that an application of state law would change the posture of the federal constitutional issues. No state administrative process is involved. The case has been thoroughly briefed and argued on the merits, and is presented on a clear and complete record." App. 73. Since the judicially created doctrine of abstention involves duplication of effort and expense and an attendant delay, see *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 418 (1964), this Court has emphasized that it should be applied only "where the issue of state law is un-

lants promptly appealed, and we noted probable jurisdiction.[6]

I

The Oregon Forcible Entry and Wrongful Detainer Statute establishes a procedure intended to insure that any entry upon real property "shall be made in a peaceable manner and without force." § 105.105. A landlord may bring an action for possession whenever the tenant has failed to pay rent within 10 days of its due date, when the tenant is holding contrary to some other covenant in a lease, and whenever the landlord has terminated the rental arrangement by proper notice and the tenant remains in possession after the expiration date specified in the notice. § 105.115. Service of the complaint on the tenant must be not less than two nor more than four days before the trial date, § 105.135; a tenant may obtain a two-day continuance, but grant of a longer continuance is conditioned on a tenant's posting security for the payment of any rent that may accrue, if the plaintiff ultimately prevails, during the period of the continuance. § 105.140. The suit may be tried to either a judge or a jury, and the only issue is whether the allegations of the complaint are true, §§ 105.145, 105.150. The only award that a plaintiff may recover is restitution of possession. § 105.155. A defendant who loses such a suit may appeal only if he obtains two sureties who will provide security for the payment to the plaintiff, if the defendant ultimately loses on appeal, of twice the

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certain," *Harman* v. *Forssenius*, 380 U. S. 528, 534 (1965), and "only in narrowly limited 'special circumstances,'" *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967) (citing *Propper* v. *Clark*, 337 U. S. 472, 492 (1949)). See *Reetz* v. *Bozanich*, 397 U. S. 82 (1970). The Oregon FED statute has been in effect for over 100 years, and there is a substantial body of interpretative decisions by the Oregon courts.

[6] 402 U. S. 941 (1971).

rental value of the property from the time of commencement of the action to final judgment. § 105.160.[7]

Appellants' principal attacks[8] are leveled at three characteristics of the Oregon FED Statute: the requirement of a trial no later than six days after service of the complaint unless security for accruing rent is provided; the provisions of § 105.145 which, either on their face or as construed, are said to limit the triable issues in an FED suit to the tenant's default and to preclude consideration of defenses based on the landlord's breach of a duty to maintain the premises; and the requirement of posting bond on appeal from an adverse decision in twice the amount of the rent expected to accrue pending appellate decision. These provisions are asserted to violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Except for the appeal bond requirement (see Part IV, *infra*), we reject these claims.

II

We are unable to conclude that either the early-trial provision or the limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment. In those recurring cases where the tenant fails to pay rent or holds over after expiration of his tenancy and the issue in the ensuing litigation

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[7] If the FED action is initiated in the district court instead of the circuit court, the double bond is required for a trial *de novo* in the circuit court. ORS §§ 46.250, 53.090. Appellants do not, however, contend that there is anything unconstitutional about the District Court trial, except for the claims noted above, and they do not contend that the dual level trial system itself violates their constitutional rights. Brief for Appellants 63.

[8] Appellants make a conclusory argument that allowing a landlord to allege that the tenant is guilty of "unlawful holding by force" is impermissible on grounds of vagueness. Brief for Appellants 58–59. ORS § 105.115 adequately defines this term, however, see n. 3, *supra*, and the District Court properly rejected this argument.

is simply whether he has paid or held over, we cannot declare that the Oregon statute allows an unduly short time for trial preparation. Tenants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary. Particularly where, as here, rent has admittedly been deliberately withheld and demand for payment made, claims of prejudice from an early trial date are unpersuasive. The provision for continuance of the action if the tenant posts security for accruing rent means that in cases where tenant defendants, unlike appellants, deny nonpayment of rent and may require more time to prepare for litigation, they will not be forced to trial if they provide for rent payments in the interim. A requirement that the tenant pay or provide for the payment of rent during the continuance of the action is hardly irrational or oppressive. It is customary to pay rent in advance, and the simplicity of the issues in the typical FED action will usually not require extended trial preparation and litigation, thus making the posting of a large security deposit unnecessary. Of course, it is possible for this provision to be applied so as to deprive a tenant of a proper hearing in specific situations, but there is no such showing made here, and possible infirmity in other situations does not render it invalid on its face.[9]

Nor does Oregon deny due process of law by restricting the issues in FED actions to whether the tenant has paid rent and honored the covenants he has assumed, issues that may be fairly and fully litigated under the Oregon procedure. The tenant is barred from raising

[9] *United States* v. *National Dairy Corp.*, 372 U. S. 29, 32 (1963); *United States* v. *Raines*, 362 U. S. 17, 22 (1960).

claims in the FED action that the landlord has failed to maintain the premises, but the landlord is also barred from claiming back rent or asserting other claims against the tenant.[10] The tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action.[11]

"Due process requires that there be an opportunity to present every available defense." *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168 (1932). See also *Nickey* v. *Mississippi*, 292 U. S. 393, 396 (1934). Appellants do not deny, however, that there are available procedures to litigate any claims against the landlord cognizable in Oregon. Their claim is that they are denied due process of law because the rental payments are not suspended while the alleged wrongdoings of the landlord are litigated.[12] We see no constitutional barrier to Ore-

[10] ORS § 16.220 (1)(i) provides that when a plaintiff joins an FED action with an action for rental due, "the defendant shall have the same time to answer, or otherwise plead, as is now provided by law in actions for the recovery of rental due." ORS § 91.220 provides that accrued rent may be recovered in an "action at law" which is subject to the general rules of pleading and procedure enumerated in § 16.010 and not the special FED procedures.

[11] Oregon also recognizes certain equitable defenses in FED actions, see *Leathers* v. *Peterson*, 195 Ore. 62, 244 P. 2d 619 (1952) (mental incompetence); *Crossen* v. *Campbell*, 102 Ore. 666, 202 P. 745 (1921) (forfeiture of lease); *Friedenthal* v. *Thompson*, 146 Ore. 640, 31 P. 2d 643 (1934) (reformation of lease); *Menefee Lumber Co.* v. *Abrams*, 138 Ore. 263, 5 P. 2d 709 (1931) (lessor's breach of dependent covenant not to rent another part of premises to business competitive with lessee—tried by stipulation), and ORS § 16.460 provides that when an equitable matter is interposed, the FED action will be stayed until the equitable matters are determined. Apparently, however, the defenses sought to be raised by appellants are not in this category.

[12] This claim is explicitly presented in the complaint: "For their cause of action, said Plaintiffs set forth the following: . . . (c) That said Defendant-Landlords have a duty to refrain from taking retali-

gon's insistence that the tenant provide for accruing rent pending judicial settlement of his disputes with the lessor.[12]

The Court has twice held that it is permissible to segregate an action for possession of property from other actions arising out of the same factual situation that may assert valid legal or equitable defenses or counterclaims. In *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133 (1915) (Holmes, J.), the Court upheld against due process attack a Louisiana procedure that provided that a defendant sued in a possessory action for real property could not bring an action to establish title or present equitable claims until after the possessory suit was

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atory measures against said Plaintiffs as a result of this action or as a result of reporting Housing Code violations or as a result of Plaintiffs withholding rent to compel the Defendant-Landlords to repair the premises." App. 24. Appellants stipulated that, if permitted, they would raise various legal and equitable defenses (unconstitutionality of the proceeding, illegality of contract, failure of consideration, warranty of fitness of habitability, unclean hands of landlord) if an FED action were brought against them. App. 44. It is sufficiently clear from the District Court's pretrial order that all of the parties, including the defendant state court judge, agreed that the defenses appellants desired to press were unavailable in Oregon FED actions. The District Court agreed that this accurately reflected Oregon law. In these circumstances, therefore, there was no reason for the District Court to abstain. See n. 5, *supra*.

[12] At oral argument, appellants conceded that if a tenant remained in possession without paying rent, a landlord might be deprived of property without due process of law:

"Q: If you didn't have that deposit in escrow [rent paid by tenants during litigation], might you not be confronted with a counter-suggestion that this is a taking of property without due process, without compensation?

"Mr. Clough: Of course; that is correct.

"Q: But you would accept that as an invariable condition to maintaining possession?

"Mr. Clough: Yes, we'd have no problem with that." Tr. of Oral Arg. 14.

brought to a conclusion.[14] In *Bianchi* v. *Morales*, 262 U. S. 170 (1923) (Holmes, J.), the Court considered Puerto Rico's mortgage law which provided for summary foreclosure of a mortgage without allowing any defense except payment. The Court concluded that it was permissible under the Due Process Clause to "exclude all claims of ultimate right from possessory actions," *id.*, at 171, and to allow other equitable defenses to be set up in a separate action to annul the mortgage.

Underlying appellants' claim is the assumption that they are denied due process of law unless Oregon recognizes the failure of the landlord to maintain the premises as an operative defense to the possessory FED action and as an adequate excuse for nonpayment of rent. The Constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants. Likewise, the Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated. The substantive law of landlord-tenant relations differs

[14] "It would be a surprising extension of the Fourteenth Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of the mediaeval law. From the *exceptio spolii* of the Pseudo-Isidore the Canon Law and Bracton to the assize of novel disseisin the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to—or at least that in a proceeding to right such disturbance a claim of title could not be set up; and from Kant to Ihering there has been much philosophising as to the grounds. But it is unnecessary to follow the speculations or to consider whether the principle is eternal or a no longer useful survival. The constitutionality of the law is independent of our views upon such points." *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133, 134 (1915).

widely in the various States. In some jurisdictions, a tenant may argue as a defense to eviction for nonpayment of rent such claims as unrepaired building code violations, breach of an implied warranty of habitability, or the fact that the landlord is evicting him for reporting building code violations or for exercising constitutional rights.[15] Some States have enacted statutes authorizing rent withholding in certain situations.[16] In other jurisdictions, these claims, if cognizable at all, must be litigated in separate tort, contract, or civil rights suits. There is no showing that Oregon excludes any defenses it recognizes as "available" on the three questions (physical possession, forcible withholding, legal right to possession) at issue in an FED suit.

III

We also cannot agree that the FED Statute is invalid on its face under the Equal Protection Clause. It is true that Oregon FED suits differ substantially from other

[15] For various tenant remedies for housing code violations, see N. Y. Real Prop. Actions Law §§ 769–782 (Supp. 1971–1972); *Brown* v. *Southall Realty Co.*, 237 A. 2d 834 (D. C. Ct. App. 1968); S. D. Comp. Laws Ann. § 43–32–9 (1967). For recognition of an implied warranty of habitability, see *Pines* v. *Perssion*, 14 Wis. 2d 590, 111 N. W. 2d 409 (1961); *Earl Millikin, Inc.* v. *Allen*, 21 Wis. 2d 497, 124 N. W. 2d 651 (1963); Cal. Civ. Code § 1941 (1954 and Supp. 1971). For prohibitions of various kinds of retaliatory evictions, see Ill. Rev. Stat., c. 80, § 71 (1971); Mich. Comp. Laws § 564.204, added by Pub. Acts 1968, c. 2, Mich. Stat. Ann. § 26.1300 (204) (1970); *Edwards* v. *Habib*, 130 U. S. App. D. C. 126, 397 F. 2d 687 (1968), cert. denied, 393 U. S. 1016 (1969); *United States* v. *Bruce*, 353 F. 2d 474 (CA5 1965); *United States* v. *Beaty*, 288 F. 2d 653 (CA6 1961).

[16] N. Y. Mult. Resid. Law § 305–a (Supp. 1971–1972); Ill. Rev. Stat., c. 23, § 11–23 (1971); Mass. Gen. Laws Ann., c. 239, § 8A (Supp. 1971); Pa. Stat. Ann., Tit. 35, § 1700–1 (Supp. 1971). See generally Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304 (1965).

litigation, where the time between complaint and trial is substantially longer,[17] and where a broader range of issues may be considered. But it does not follow that the Oregon statute invidiously discriminates against defendants in FED actions.

The statute potentially applies to all tenants, rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness. And classifying tenants of real property differently from other tenants for purposes of possessory actions will offend the equal protection safeguard "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective," *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961), or if the objective itself is beyond the State's power to achieve, *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *NAACP* v. *Alabama*, 377 U. S. 288 (1964); *Douglas* v. *California*, 372 U. S. 353 (1963). It is readily apparent that prompt as well as peaceful resolution of disputes over the right to possession of real property is the end sought by the Oregon statute.[18] It is also clear that the provisions for early trial and simplification of issues are closely related to that purpose. The equal protection claim with respect to these pro-

[17] An FED defendant has from two to six days between the serving of the complaint and trial unless he files a continuance bond. See §§ 105.135, 105.140, n. 3, *supra*.

[18] The statute itself declares the public policy of the State of Oregon to be that: "No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force." § 105.105. One out of actual possession of real property, although lawfully entitled to such possession, is liable criminally for assault and battery if, instead of filing an FED action, he accomplishes an entry upon such real property by the exertion of force against the person of an actual occupant who opposes and resists such entry. *Coghlan* v. *Miller*, 106 Ore. 46, 54–56, 211 P. 163, 166–167 (1922).

visions thus depends on whether the State may validly single out possessory disputes between landlord and tenant for especially prompt judicial settlement. In making such an inquiry a State is "presumed to have acted within [its] constitutional power despite the fact that, in practice, [its] laws result in some inequality." *McGowan* v. *Maryland*, *supra*, at 425–426.

At common law, one with the right to possession could bring an action for ejectment, a "relatively slow, fairly complex, and substantially expensive procedure." [19] But, as Oregon cases have recognized, the common law also permitted the landlord to "enter and expel the tenant by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary, and do[es] no wanton damage." *Smith* v. *Reeder*, 21 Ore. 541, 546, 28 P. 890, 891 (1892). The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with "violence and quarrels and bloodshed." *Entelman* v. *Hagood*, 95 Ga. 390, 392, 22 S. E. 545 (1895).[20] An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges.

Hence the Oregon statute was enacted in 1866 to alter the common law and obviate resort to self-help and violence. The statute, intended to protect tenants as well as landlords, provided a speedy, judicially super-

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[19] A. Casner & W. Leach, Cases and Text on Property 451 (2d ed. 1969).

[20] See Annot., Right of Landlord to Dispossess Tenant Without Legal Process, 45 A. L. R. 313 (1926), 49 A. L. R. 517 (1927), 60 A. L. R. 280 (1929), 101 A. L. R. 476 (1936), 6 A. L. R. 3d 177 (1966).

vised proceeding to settle the possessory issue in a peaceful manner:

> "But if [the landlord] forcibly enter and expel the tenant, while he may not be liable to him in an action of tort, he is guilty of a violation of the forcible entry and detainer act, which is designed to protect the public peace; and in such case the law will award restitution to the tenant, not because it recognizes any rights in him, but for the reason that out of regard for the peace and good order of society it does not permit a person in the quiet and peaceable possession of land to be disturbed by force, even by one lawfully entitled to the possession." *Smith* v. *Reeder*, 21 Ore., at 546–547, 28 P., at 891.

Before a tenant is forcibly evicted from property the Oregon statute requires a judicial determination that he is not legally entitled to possession. "The action of forcible entry and detainer is intended for the benefit of him whose possession is invaded." *Taylor* v. *Scott*, 10 Ore. 483, 485 (1883). The objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant has ample historical explanation and support. It is not beyond the State's power to implement that purpose by enacting special provisions applicable only to possessory disputes between landlord and tenant.

There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the

landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes.

Appellants argue, however, that a more stringent standard than mere rationality should be applied both to the challenged classification and its stated purpose. They contend that the "need for decent shelter" and the "right to retain peaceful possession of one's home" are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest. They invoke those cases holding that certain classifications based on unalterable traits such as race [21] and lineage [22] are inherently suspect and must be justified by some "overriding statutory purpose." They also rely on cases where classifications burdening or infringing constitutionally protected rights were required to be justified as "necessary to promote a compelling governmental interest." [23]

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[21] *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Loving* v. *Virginia*, 388 U. S. 1 (1967).

[22] *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948); *Oyama* v. *California*, 332 U. S. 633 (1948); *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968).

[23] *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969) (emphasis omitted) (right to travel). See also *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966) (right to vote). Cf. *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942).

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

Since the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute is constitutionally permissible and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment.

IV

We agree with appellants, however, that the double-bond prerequisite for appealing an FED action violates their right to the equal protection of the laws. To appeal a civil case in Oregon, the ordinary litigant must file an undertaking, with one or more sureties, covering "all damages, costs and disbursements which may be awarded against him on the appeal." (ORS § 19.040.[24]) In order to secure a stay of execution, the undertaking, where the judgment is for money, must also provide that the appel-

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[24] The Oregon civil appeal bond statute provides:

"19.040 Form of undertaking on appeal; conditions for stay of proceedings; enforcement against sureties on dismissal of appeal. (1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal;

lant will satisfy the judgment if he loses the appeal or, if the judgment is for real property, that he will commit no waste during the pendency of the appeal and, if he loses the appeal, that he will pay for the use of the property during this time. In an FED action, however, a defendant who loses in the district court and who wishes to appeal must give "*in addition to* the undertaking now required by law upon appeal," an undertaking with two sureties for the payment of twice the rental value of

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but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following:

"(b) If the judgment or decree appealed from is for the recovery of the possession of real property, for a partition thereof, or the foreclosure of a lien thereon, that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if such judgment or decree or any part thereof is affirmed, the appellant will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding the sum therein specified, to be ascertained and tried by the court or judge thereof.

"(2) When the decree appealed from requires the execution of a conveyance or other instrument, execution of the decree is not stayed by the appeal, unless the instrument is executed and deposited with the clerk within the time allowed to file the undertaking, to abide the decree of the appellate court.

"(3) If the appeal is dismissed, the judgment or decree, so far as it is for the recovery of money, may, by the appellate court, be enforced against the sureties in the undertaking for a stay of proceedings, as if they were parties to the judgment or decree."

An FED action may be brought in the circuit court, the district court, or before a justice of the peace. ORS § 19.040 by its terms applies to appeals from the circuit court to the Court of Appeals and to the Supreme Court, but if the FED action is initiated in a district court or a justice's court, ORS § 53.040 requires that an appellant to the circuit court give an undertaking with one or more sureties that he will pay "all costs and disbursements that may be awarded against him on the appeal."

the premises "from the commencement of the action in which the judgment was rendered until final judgment in the action." (ORS § 105.160.) (Emphasis added.) In the event the judgment is affirmed, the landlord is automatically entitled to twice the rents accruing during the appeal without proof of actual damage in that amount. See *Priester* v. *Thrall*, 229 Ore. 184, 187, 349 P. 2d 866, 868 (1960). In *Scales* v. *Spencer*, 246 Ore. 111, 113–114, 424 P. 2d 242, 243 (1967), the Oregon Supreme Court explained the rationale of the double-bond requirement:

> "Inasmuch as a final judgment for restitution could not include a judgment for rent pending appeal it appears obvious that the legislative purpose for requiring this particular bond on appeal was to guarantee that the rent pending an appeal would be paid. That the bond must provide for double the rental value was, no doubt, intended to prevent frivolous appeals for the purpose of delay. If there were not some added cost or restriction every ousted tenant would appeal, regardless of the justification. It can also be assumed that the additional payment would compensate for waste or is in lieu of damages for the unlawful holding over."

We have earlier said that Oregon may validly make special provision for the peaceful and expeditious settlement of disputes over possession between landlord and tenant and that the early-trial and continuance bond provisions of the FED statute rationally implement that purpose because the tenant's right to possession beyond the initial six-day period is conditioned on securing the landlord against the loss of accruing rent. Similar conditions on the tenant's right to appeal, such as those imposed by § 19.040, would also raise no serious constitutional questions, at least on the face of such a statute. Section 105.160, however, imposes additional requirements that in our judgment bear no reasonable relation-

ship to any valid state objective and that arbitrarily discriminate against tenants appealing from adverse decisions in FED actions.

This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956); *District of Columbia* v. *Clawans*, 300 U. S. 617, 627 (1937); *Ohio* v. *Akron Park District*, 281 U. S. 74, 80 (1930); *Reetz* v. *Michigan*, 188 U. S. 505, 508 (1903); *McKane* v. *Durston*, 153 U. S. 684, 687–688 (1894), and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin* v. *Illinois*, *supra*; *Smith* v. *Bennett*, 365 U. S. 708 (1961); *Lane* v. *Brown*, 372 U. S. 477 (1963); *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966); *Gardner* v. *California*, 393 U. S. 367 (1969). Cf. *Coppedge* v. *United States*, 369 U. S. 438 (1962); *Ellis* v. *United States*, 356 U. S. 674 (1958).

It cannot be denied that the double-bond requirement heavily burdens the statutory right of an FED defendant to appeal. While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord. This requirement is unnecessary to assure the landlord payment of accrued rent since the undertaking an FED defendant must file pursuant to the general appeal bond statute, ORS § 19.040 (b), must cover "the value of the use and occupation of such property . . . from the time of the appeal until the delivery of the possession thereof,"

and since the landlord may bring a separate action at law for payment of back rent under ORS § 91.220.[25] Moreover, the landlord is protected against waste or damages occurring during the appeal by the § 19.040 (b) undertaking that the tenant must file if he wishes to remain in possession of the property during the appeal. The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond. The impact on FED appellants is unavoidable: if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination.

We do not question here reasonable procedural provisions to safeguard litigated property, cf. *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U. S. 37 (1954), or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied. Moreover, a State has broad authority to provide for the recovery of double or treble damages in cases of illegal conduct that it regards as particularly reprehensible, even though posting an appeal bond by an appellant will be doubly or triply more difficult than it otherwise would be. In the case before us, however, the

[25] The § 19.040 (b) undertaking does not, it is true, cover any rent that has accrued from the time the FED action is filed until the time the appeal is taken. However, the § 105.145 continuance bond filed by the tenant if the pretrial delay is over six days provides security for this rent, or such rent may be recovered as back rent in the § 91.220 action at law.

State has not sought to protect a damage award or property an appellee is rightfully entitled to because of a lower court judgment.[26] Instead, it has automatically doubled the stakes when a tenant seeks to appeal an adverse judgment in an FED action. The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement of ORS § 105.160 violates the Equal Protection Clause.

The judgment of the District Court is

Affirmed in part and reversed in part.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting in part.

I

I agree with the Court that the double-bond provision in the Oregon eviction statute denies tenants who are affected by forcible entry and wrongful detainer pro-

[26] *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), is distinguishable from the instant case. There, the Court upheld a state law that required a shareholder who wished to file a shareholder's derivative suit but who owned less than 5% of the corporation's stock or whose stock was worth less than $50,000 to file as a precondition to bringing the suit a bond for the reasonable expenses, including attorney's fees, that might be incurred by defendants. The security requirement there applied to a *plaintiff* and its purpose was to protect the corporation from being injured by "strike suits" that harmed the very interests that plaintiffs claimed to be protecting.

cedures (called FED) that equal protection guaranteed against state action by the Fourteenth Amendment.

The ordinary or customary litigant who appeals must file a bond with one or more sureties covering "all damages, costs and disbursements which may be awarded against him on the appeal." [1] To obtain a stay of execution pending the appeal the undertaking must also provide: (1) if the suit is for recovery of money or personal property (or its value), that the appellant will satisfy the claim if he loses the appeal and (2) if the judgment is for the recovery of possession of real property, for a partition or for the foreclosure of a lien, that during possession the appellant will not commit waste and that if he loses the appeal, he will pay the value of the use of the property during the appeal.

By contrast, if a tenant in an FED action appeals, he must give "in addition to the undertaking now required by law upon appeal" [2] an undertaking with two sureties for payment of twice the rental value of the premises from the commencement of the action until final judgment.

The more onerous requirement placed on tenants is said to be a guarantee that rent pending appeal will be paid. *Scales* v. *Spencer*, 246 Ore. 111, 424 P. 2d 242. Yet the general appeal statute would give that protection.[3]

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[1] Ore. Rev. Stat. § 19.040 (1).

[2] *Id.*, § 105.160.

[3] The general appeal statute (Ore. Rev. Stat. § 19.040 (1)), however, applies only to appeals from the trial court of general jurisdiction (circuit court). FED actions may be brought in the circuit court, Ore. Rev. Stat. § 105.110, but are also within the jurisdiction of the district and justice of the peace courts—courts of limited jurisdiction. *Ibid.* A litigant may appeal from these courts to the circuit court, Ore. Rev. Stat. § 46.250, in which case trial is had *de novo*, and may stay an adverse decision pending appeal by giving an undertaking, with one or more sureties, that he will pay all costs and disbursements against him awarded on the appeal, and

It is said that the landlord deserves protection for waste or damages pending appeal. *Ibid.* But that protection is also provided under the general appeal statute.

It is said that a double-rent bond protects the landlord against possible waste or damage which occurs prior to, not during, the appeal. But the same reason would be germane to waste or damage in other suits brought to obtain possession of property. Drawing the line between the present suits to obtain possession and other suits and saddling tenants with double-rent bonds but not saddling other owners with such bonds seems to me obviously an invidious discrimination.

It is said that the double-rent bond is designed to prevent frivolous appeals taken for the sole purpose of delaying eviction as long as possible. *Ibid.* Yet frivolous appeals could as well be taken by defendants whose lien is being foreclosed and who desire to remain in possession. It is an invidious discrimination at which the Equal Protection Clause is aimed for a legislature to select one class of appellants who seek to retain possession of property and place a more onerous condition on their right to appeal than is placed on other like appellants.

In sum, the double-bond procedure is landlord legislation, not evenly weighted between his proprietary interest in the property and the rights of the tenants. Over a third of our population lives in apartments or other rented housing.[4] The home—whether rented or

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that he will satisfy any judgment that might be entered against him by the appellate court. Ore. Rev. Stat. § 53.040.

Appellees argue that the undertaking provided for by Ore. Rev. Stat. § 53.040 is inadequate to protect landlords' rights. The answers are two. First, the landlord has the prerogative to bring suit in the circuit court, should he desire the greater protection of the general appeal statute. Second, the legislature could provide that the general appeal statute apply to FED actions brought in the district, as well as circuit, courts.

[4] 1970 Census of Housing, Advance Report HC (V. 1), p. 11.

owned—is the very heart of privacy in modern America. MR. JUSTICE MARSHALL in *Hall* v. *Beals*, 396 U. S. 45, 52 (dissenting), spoke of the protection afforded "fundamental interests" when it came to classifications made by legislatures. In that case it was the franchise. Race is in the same category (*McLaughlin* v. *Florida*, 379 U. S. 184); so are wealth (*Douglas* v. *California*, 372 U. S. 353; *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663); procreation (*Skinner* v. *Oklahoma*, 316 U. S. 535) and interstate travel (*Shapiro* v. *Thompson*, 394 U. S. 618). Classifications that burden, impinge, or discriminate against such fundamental interests [5] are "highly suspect." *McDonald* v. *Board of Elections*, 394 U. S. 802, 807.

Modern man's place of retreat for quiet and solace is the home. Whether rented or owned it is his sanctuary. Being uprooted and put into the street is a traumatic experience. Legislatures can, of course, protect property interests of landlords. But when they weigh the scales as heavily as does Oregon for the landlord and against the fundamental interest of the tenant they must be backed by some "compelling . . . interest," *Kramer* v. *Union School District*, 395 U. S. 621, 627. No such "compelling . . . interest" underlies this statutory scheme.

The double-rent bond required of tenants, but not required of others in possession of real estate, is properly held to be unconstitutional by reason of the Equal Protection Clause of the Fourteenth Amendment.

II

I cannot agree, however, that the remainder of Oregon's FED statute satisfies the requirements of due process of law.

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[5] The "rational" relationship test applied to strictly economic or business interests (*United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4, 6; *McDonald* v. *Board of Elections*, 394 U. S. 802, 809) is not germane here.

I am satisfied that the Court properly addresses itself to the remaining questions rather than requiring appellants, who are already destitute, to start litigation all over in the Oregon state courts. The three-judge court that decided this case is a panel of distinguished Oregon lawyers and judges. Judge Goodwin came to the District Court from the Supreme Court of Oregon. Judge Solomon has practiced and sat in Portland, Oregon, for years. Judge Kilkenny was a well-known practitioner in Pendleton, Oregon, before coming to the federal bench. These men have their roots deep in Oregon law and are by no means outsiders unfamiliar with it. On local law questions we have long deferred to federal judges who have come from law practice in a State whose local law is at issue in a federal case. See *MacGregor* v. *State Mutual Co.*, 315 U. S. 280, 281; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237; *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204; *Magenau* v. *Aetna Freight Lines*, 360 U. S. 273, 281 n. 2 (Frankfurter, J., dissenting).

This is a most appropriate occasion to honor that tradition. While there are occasional appropriate cases for abstention (see *Reetz* v. *Bozanich*, 397 U. S. 82), this Court's abstention doctrine that requires litigants to start all over again in a state court after having financed their course all the way to this Court is likely to exhaust only the litigants.

This all-Oregon panel said on the abstention issue:

> "It is unlikely that an application of state law would change the posture of the federal constitutional issues. No state administrative process is involved. The case has been thoroughly briefed and argued on the merits, and is presented on a clear and complete record. It is ripe for decision. Only one appeal (to the United States Supreme Court) will now be needed to settle the federal constitutional question. While the state courts are also capable of

applying the United States Constitution to a challenged state law, two levels of appeal would be needed in an F. E. D. case within the state system. A final state-court decision would still not necessarily settle the federal constitutional question.

"Closely related to the time element is economy. Cases of this sort tax both courts and counsel. Until finally resolved, these cases produce expense, uncertainty, and frustration. Delay produces no balancing benefit, either of comity or of clarity in state-federal relations."

Agreeing with that view, I come to the remaining constitutional issues.

In my view, there are defects in the Oregon procedures which go to the essence of a litigant's right of access to the courts, whether he be rich or poor, black or white.

The problem starts with Judge Wright's statement in *Javins* v. *First National Realty Corp.*, 138 U. S. App. D. C. 369, 372, 428 F. 2d 1071, 1074:

"When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."

This vital interest that is at stake may, of course, be tested in so-called summary proceedings. But the requirements of due process apply and due process entails the right "to sue and defend in the courts," a right we have described as "the alternative of force" in an organized society. *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148. In essence the question comes down to notice and an opportunity to defend. *Armstrong* v. *Manzo*, 380 U. S. 545; *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306.

Oregon gives the tenant "not less than two or more than four days'" [6] after service of summons to go to trial. If service is on a Friday, trial could be on the following Monday. There can be no continuance for more than two days "unless the defendant . . . gives an undertaking . . . with good and sufficient security" covering the rent which may accrue during the trial.[7]

For slum tenants—not to mention the middle class—this kind of summary procedure usually will mean in actuality no opportunity to be heard. Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words. It is, indeed, a meaningless notice and opportunity to defend. The trial is likely to be held in the presence of only the judge and the landlord and the landlord's attorney.[8]

Moreover, even for tenants who have been lucky to find a lawyer, the landlord need only plead [9] and prove [10] the following items in order to win a judgment: (1) a description of the premises, (2) that the defendant is in possession of the premises, (3) that he entered upon them "with force," or unlawfully holds them "with force," [11] and (4) that the plaintiff is entitled to possession.

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[6] Ore. Rev. Stat. § 105.135.

[7] *Id.*, § 105.140.

[8] The majority stresses the "fact" that a tenant *may* have up to six days to prepare for trial. But as of *right*, the statute guarantees only two. While various discretionary actions may result in a tenant's having the full six days, "[t]he right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly*, 176 U. S. 398, 409.

[9] Ore. Rev. Stat. § 105.125.

[10] *Id.*, § 105.145.

[11] "Unlawful holding by force" is defined by Ore. Rev. Stat. § 105.115 to occur in the following circumstances: (1) if a tenant "fails or refuses to pay rent within 10 days after it is due" pursuant to a lease or agreement, (2) if he fails or refuses "to deliver posses-

Affirmative defenses such as the failure of the landlord to make repairs or that the motivation for the eviction was retaliation for a report by the tenant of a violation of a housing code are apparently precluded. This reflects the ancient notion that a lease is a conveyance of an "estate in land," in which the respective covenants—a tenant's to pay rent, the landlord's to repair—were deemed independent of each other. This approach was appropriate in the feudal culture in which property law evolved.[12] But this feudal notion of landlord-tenant law—rooted in the special needs of an agrarian society—has not been a realistic approach to

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sion of the premises after being in default on payment of rent for 10 days," (3) if he remains in possession after receipt of a statutory notice to quit (see Ore. Rev. Stat. § 105.120) and was holding under an expired lease or was a month-to-month or year-to-year tenant, or (4) if he "is holding contrary to any condition or covenant of the lease" or "without any written lease or agreement."

[12] "Under feudal tenure, and in more recent times, in the setting of a largely agrarian society, the tenant rented land primarily for the production of crops. The fact that a building or dwelling stood on the premises was, in the main, incidental, because the major emphasis was on the tenant's right to till the soil for the production of crops, to supply him a livelihood. For as long as the tenant rented the land he was the holder of an estate for years; in effect, he was the owner for a limited term. If he wanted to live in comfort, and if a dwelling stood on the land, it was his business to make that dwelling livable, to see to it that the roof was watertight, that the well was in good shape, and that whatever sanitary facilities there were, were adequate. While he was not to commit 'waste'—destruction of the property that would leave it in less productive condition than when he rented it—the owner owed him no obligation to assist in maintaining his buildings in a livable or decent condition.

"If anything, the obligation ran the other way, because an intentional or grossly negligent destruction of buildings on the premises might be construed as waste by the tenant. Thus, from its very beginning, the obligation to repair went hand in hand with control. Since the landlord gave up control over the premises for the stated term of years of the leasehold, during that term whatever the

landlord-tenant law for many years,[13] and has been replaced by what an eminent authority has described as "a predominately contractual" analysis of leasehold interests.[14] This led Judge Wright in *Javins* v. *First National Realty Corp.*, 138 U. S. App. D. C., at 373, 428 F. 2d, at 1075, to hold "that leases of urban dwelling units should be interpreted and construed like any other contract." Oregon takes the same view and treats a lease as a contract. *Wright* v. *Baumann*, 239 Ore. 410, 398 P. 2d 119; *Eggen* v. *Wetterborg*, 193 Ore. 145, 297 P. 2d 970.

The Housing Code of Portland, Oregon, has as its declared purpose the protection of the life, health, and welfare of the public and of the owners and occupants of residential buildings.[15] It forbids anyone to use or permit a building to be used in violation of its provisions. *Id.*, § 8–204.

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obligation to repair would rest on the temporary owner, the tenant, rather than on the holder of the reversionary interest, the owner of the fee. Initially, the dependence of the obligation to repair on the capacity to control was retained and applied to non-rural housing as well." Legal Remedies for Housing Code Violations, National Commission On Urban Problems, Research Report No. 14, pp. 110–111 (1968).

[13] "The legal rules pertaining to the repair of leaseholds became wholly unreal and anachronistic with increasing urbanization during the 19th century, with the increasing reliance on multi-unit rental property, such as tenement houses, to provide shelter for the urban areas' growing industrial labor population. In an agrarian setting it made sense to require the tenant to keep in good repair an entire dwelling house he had rented from an owner. On the other hand, to require a relatively transient tenant to assume the obligation of repair in a multi-unit building or in a tenement house with respect to his rooms and with respect to plumbing, heating, and other fixtures that were interconnected with other parts and fixtures in the building made no sense at all." *Id.*, at 111–112.

[14] R. Powell & P. Rohan, Real Property 179 (1967).

[15] Housing Code § 8–102.

We do not know what Oregon would hold if a lease in violation of a housing code was before it in an FED case. But if the lease is a contract, then the opportunity to be heard would certainly embrace the issue of legality, if due process is to have any real significance. Oregon's statutory FED scheme is plainly to protect landlords against loss of rental income during lengthy litigation. See *Menefee Lumber Co.* v. *Abrams*, 138 Ore. 263, 5 P. 2d 709; *Friedenthal* v. *Thompson*, 146 Ore. 640, 31 P. 2d 643. But that is no justification for denial to tenants of due process, as there are other less drastic devices for protecting the landlord. Judge Wright in the *Javins* case, 138 U. S. App. D. C., at 381 n. 67, 428 F. 2d, at 1083 n. 67, proposed "an excellent protective procedure" in the form of a requirement that the tenant, who raises an affirmative defense based on housing code violations or other discriminatory landlord practices, pay rent into court as it became due.[16] See also *Bell* v. *Tsintolas Realty Co.*, 139 U. S. App. D. C. 101, 430 F. 2d 474. The District Court in the present case employed a similar procedure.

Appellees assert that the affirmative defenses mentioned are not relevant to the issues posed under Oregon's FED Act. They represent to us that the Oregon judges at the trial level have usually held that such defenses are not relevant, though the Oregon Supreme Court has not considered the question. What Oregon will hold or should hold is not the issue. Since, however, Oregon holds that a lease is a contract, all defenses

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[16] Oregon's continuance bond, Ore. Rev. Stat. § 105.140, serves the same function:

"No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant."

relevant to its legality and its actual operation would seem to be within the ambit of the opportunity to be heard that is embraced within the concept of due process, at least until the issue has been resolved to the contrary.

The Court suggests that landlord-tenant law raises no federal questions. This is not quite so clear to me. We have held that the right to complain to public authorities is constitutionally protected. *In re Quarles*, 158 U. S. 532. If a defendant in an FED action is denied the right to assert as a defense the claim that he is being evicted, not for the nonpayment of rent, but because he exercised his constitutional right to complain to public officials about the disrepair of his apartment, a substantial federal question would be presented. See *Edwards* v. *Habib*, 130 U. S. App. D. C. 126, 129–137, 397 F. 2d 687, 690–698 (1968).

The Court also implies that to find for appellants in this case, we would have to hold, as a matter of constitutional law, that a lease is required to be interpreted as an ordinary contract. But this is not at all necessary. Oregon has already adopted the modern, contractual view of leasehold analysis. The issue that confronts the Court is not whether such a view is constitutionally compelled, but whether, once Oregon has gone this far as a matter of state law, the requirements of due process permit a restriction of contract-type defenses in an FED action. Cf. *Shapiro* v. *Thompson*, 394 U. S., at 627 n. 6; *Sherbert* v. *Verner*, 374 U. S. 398, 404–406.

Normally a State may bifurcate trials, deciding, say, the right to possession in one suit and the right to damages in another. See *Bianchi* v. *Morales*, 262 U. S. 170; *American Surety Co.* v. *Baldwin*, 287 U. S. 156.

But where the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban

life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case.

Bianchi v. *Morales*, *supra*, which sanctioned the bifurcated trial in the rural setting of Puerto Rico, where the contest was between mortgagor and mortgagee, would be an insufferable addition to the law of the modern ghetto.

A judgment obtained by the landlord, whether by default or otherwise, gives him the right to levy on the goods of the tenant to recover the costs and disbursements of the suit.[17] Moreover, any past waste or damages, which are covered by the appeal bond, are not an issue in litigation in FED cases. As noted, the issues in Oregon FED cases are limited and the proceedings summary. Making the tenant liable for past waste or damage through the device of an appeal bond when he has no real opportunity to defend is a manifest denial of due process.

I dissent from an affirmance of this judgment.

MR. JUSTICE BRENNAN, dissenting in part.

In my view the District Court erred in declining to apply the doctrine of abstention with respect to the availability of defenses in FED actions.* The issue

[17] Ore. Rev. Stat. § 105.155.

*Abstention on the double-bond provision is not required in light of the Oregon Supreme Court's decision in *Scales* v. *Spencer*, 246 Ore. 111, 424 P. 2d 242 (1967). I agree with the Court that this provision violates the Equal Protection Clause.

is whether Oregon would violate the Fourteenth Amendment if its substantive law in some circumstances recognized tenants' rights to withhold rent and retain possession based on the landlord's breach of duty to maintain the premises, but its procedural law would not permit assertion of those rights in defense of an FED action. This constitutional issue is ripe for decision if, and only if, Oregon law (1) recognizes substantive rights of the tenant based on the landlord's breach of duty; (2) recognizes, because of such breach, that a tenant may remain in possession while withholding rent during the term or may hold over after expiration of the term, and (3) excludes the assertion of these rights to continued possession as a defense to an FED action.

The Court's opinion exposes the fallacy of the District Court's conclusion that Oregon law is "clear" and that "[i]t is unlikely that an application of state law would change the posture of the federal constitutional issues." App. 73. For the Court cites Oregon decisions that have recognized certain equitable defenses in FED actions, *ante*, at 66 n. 11, and can only conjecture that the defenses appellants sought to raise are "apparently" not in this category. We cannot confidently say, therefore, how the Oregon courts would treat appellants' defenses, if available at all, when asserted in an FED suit, or how, if those defenses are available in FED suits, the Oregon courts would apply the requirement of a trial no later than six days after service of process. Clearly, therefore, the Oregon law is susceptible of a "construction by the state courts that would avoid or modify the constitutional question." *Zwickler* v. *Koota*, 389 U. S. 241, 249 (1967); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970). In these circumstances the District Court should have remitted appellants to the Oregon courts for an authoritative interpretation of Oregon law in

these respects before adjudicating appellants' plainly nonfrivolous constitutional attacks upon the FED statute.

I would vacate the judgment of dismissal and remand with direction to the District Court (1) to enter judgment declaring that the double-bond requirement of ORS § 105.160 violates the Equal Protection Clause, and (2) to retain jurisdiction and reinstate the temporary restraining order conditioned on the payment of rent into the escrow account, provided appellants, within a time fixed by the District Court, institute appropriate proceedings in the Oregon courts to obtain an authoritative interpretation of the FED statute with respect to defenses available in actions thereunder.